IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-873

SHEARN MOODY, JR., and
JOHN S. BLEKER,

Petitioners,

VS.

THE STATE OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT OF TEXAS

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioners, Shearn Moody, Jr. and John S. Bleker, respectfully pray that a Writ of Certiorari issue to review the judgment of the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas[1] affirming the judgment of the Texas

[1]The Texas Supreme Court refused to review the present action by refusing the Petitioners' timely Application For Writ of Error with a notation of no-reversible error. Accordingly, this Petition is properly directed to the Court of Civil Appeals, rather than the Texas Supreme Court. *Michigan-Wisconsin Pipe Line Co. v. Calvert, Comptroller of Public Accounts, 347 U.S. 157 (1954); Lone Star Gas Co. v. Texas,* 304 U.S. 224 (1938).

Ancillary Receivership Court granting the Ancillary Receiver of Empire Life Insurance Company of America ("Empire") the authority to consummate the Treaty of Assumption and Bulk Reinsurance proposed by Protective Life Insurance Company ("Protective") with regard to Empire.[2]

Petitioner Moody has previously filed a Petition For Writ of Certiorari to the Supreme Court of the State of Alabama attacking that Court's affirmation of the Domiciliary Receivership Court's Order authorizing the Domiciliary Receiver of Empire to execute the Treaty of Assumption and Bulk Reinsurance. See, *Shearn Moody, Jr., vs. State of Alabama, ex. rel. Charles H. Payne*, ... U.S. .... (No. 77-428, docketed September 16, 1977). Petitioner Moody respectfully submits that the present action pertaining to the ancillary receivership should also be considered with the aforesaid action pertaining to the domiciliary receivership of Empire.

This case involves important questions as to the constitutional propriety of the approval of a Treaty of Assumption and Bulk Reinsurance which arbitrarily discriminates between policyholders, stockholders and creditors who are similarly situated and accordingly denies them the equal protection of the laws guaranteed by the Fourteenth Amendment, and the constitutional propriety of an Ancillary Receivership Court's approval of a Treaty of Assumption and Bulk Reinsurance in a proceeding where the ancillary receivership was instituted in total defiance of estab-

[2]Defendants' Exhibit 49 reveals that the Executive Vice President of Protective made private ex parte promises to the insurance commissioners of Arkansas, Nebraska, North Dakota, and Montana at a meeting in Las Vegas to induce them to sign a joint resolution recommending Protective. Paul Carr, the court appointed adviser to the Domiciliary Receivership Court, was a party to and participated in these ex parte discussions.

lished statutory procedure and where the policyholders, stockholders and creditors situated in the ancillary jurisdiction were denied notice and an opportunity to appear at a fair, unbiased[3] hearing at which to raise objections to the Reinsurance Agreement contrary to the due process clause of the Fourteenth Amendment. The total defiance of established statutory procedure exhibited by the Commissioner of Insurance and the Attorney General of the State of Texas in pushing through the creation of an ancillary receivership and the clandestine manner in which the Texas Ancillary Receiver sought to have the Reinsurance Agreement approved are totally incredulous in light of the undisputed fact that a majority of Empire's policyholders and assets are located within the State of Texas. Indeed, the Supreme Court of the State of Alabama, the state of the domiciliary receivership, expressly acknowledged this fact and in light thereof gave undue emphasis to the opinion of the Texas Court of Civil Appeals below in passing upon the Reinsurance Treaty, See, *Moody v. State of Alabama*, 344 So.2d 160 (1977).

OPINIONS BELOW

The opinion of the Court of Civil Appeals for the Tenth Supreme Judicial District of the State of Texas affirming the Ancillary Receivership court's judgment authorizing the Ancillary Receiver of Empire to consummate the Treaty of Assumption and Bulk Reinsurance is reported at 538 S.W.2d 158 (Tex. Civ. App. — Waco, 1976) and appears in the Appendix at

[3]"The opportunity to be heard has been required to be adequate, fair, full, or reasonable. The hearing or defense must be before a competent as well as before a just, equitable and fair and impartial court or tribunal, full and complete, or on the merits and before trial and judgment or decree. Such hearing has been required to be fair, fair and impartial, full and fair." 16A C.J.S. *Constitutional Law* §569(4) (1956).

page A-1. The judgment of the Court of Civil Appeals appears in the Appendix at Page A-6. The order of the Court of Civil Appeal's overruling of the Petitioners' timely Motion for Rehearing appears in the Appendix at page A-7.

The order of the Texas Supreme Court refusing the Petitioners' timely Application for a Writ of Error, with a notation of no-reversible error, appears in the Appendix at page A-9. The order of the Texas Supreme Court overruling the Petitioners' timely Application for a Rehearing of the refusal of the Application for Writ of Error appears in the Appendix at page A-10.

JURISDICTION

The Court of Civil Appeals affirmed the judgment of the Ancillary receivership court on May 13, 1976, and overruled Petitioners' timely Motion for Rehearing on June 10, 1976.

The Texas Supreme Court refused the Petitioners' timely Application for Writ of Error with a notation of no-reversible error on June 22, 1977. The Texas Supreme Court overruled the Petitioners' timely Application for Rehearing on July 20, 1977. The Petitioners presented a joint Motion for Extension of Time in which to file a Petition for Writ of Certiorari to the Honorable Justice Lewis F. Powell, Jr., who signed an order on October 14, 1977 extending their time within which to petition for certiorari to and including December 16, 1977. This Court's jurisdiction is invoked under 28 U.S.C., §1257(3) (1970).

QUESTIONS PRESENTED

1. Whether the Petitioners have been denied the right of due process in that the receivership court deprived them of a just, equitable, fair and impartial hearing in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

2. Whether the trial court was without jurisdiction to hear and decide the case in that it gave full, faith and credit to an Alabama judgment which was based upon an unconstitutional Alabama statute.

   A. Whether the subject Alabama state court interlocutory decree to which the trial court improperly gave full, faith and credit, was based upon an unconstitutional Alabama statute which gave unlimited and arbitrary discretion to the Alabama Insurance Commissioner to value the subject Empire Life Insurance Company asset at any value to be determined by him.

   B. Whether the application and enforcement of section 745(13) by the Alabama state court deprived Petitioners of substantial contractual and property rights in violation of due process, and, the improper granting of full, faith and credit by the trial court further compounded Petitioners' denial of due process.

3. Whether the failure of the Texas Ancillary Receivership Court to provide the policyholders, stockholders and creditors of Empire within its jursidiction with notice of the Ancillary Receiver's Petition for Authority to Consummate the Treaty of Assumption and Bulk Reinsurance, of the hearing thereon, and an opportunity to be heard at said hearing deprived them of their property without due process of law contrary to the Fourteenth Amendment.

4. Whether the Treaty of Assumption and Bulk Reinsurance denied the policyholders, stockholders and creditors of Empire the equal protection of the laws guaranteed by the Fourteenth Amendment by treating differently those policyholders, stockholders and creditors who were similarly situated and by failing

to treat those who were differently situated in a manner consistent with their respective rights.

5. Whether the Court of Civil Appeals denied the Petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment when it held that the Ancillary Receivership Court had jurisdiction to approve the Reinsurance Agreement even though the suit below was initiated without the direction, authorization or approval of the Texas State Board of Insurance as required by Section Thirteen of Article 21.28 of the Texas Insurance Code.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I §10 of the United States Constitution:

No State shall . . . pass any . . . Law impairing the Obligation of Contracts, . . .

The Fourteenth Amendment

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TEXAS CONSTITUTION

ARTICLE II

§1. Division of powers; three separate departments; exercise of power properly attached to other departments

Section 1. The powers of the Government of the State of

Texas shall be divided into three distinct departments, each of which shall be confined to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

STATUTORY PROVISIONS INVOLVED

ALABAMA INSURANCE CODE TITLE 28A §237:

LIFE INSURANCE, ANNUITIES AND DISABILITY INSURANCE: UNFAIR DISCRIMINATION.—

(1) no person shall make or permit any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract. (2) No person shall make or permit any unfair discrimination between amount of premium, policy fees, or rates charged for any policy or contract of disability insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever. (1957, p. 866, §4, appvd. Sept. 18, 1957; 1971, No. 407, effective Jan. 1, 1972).

ALABAMA INSURANCE CODE TITLE 28A §745:

"ASSETS" DEFINED. In any determination of the financial condition of an insurer, there shall be allowed as assets only such assets as are owned by the insurer and which consist of:

(13) other assets, not inconsistent with the provisions of this section, deemed by the Commissioner to be available for the payment of losses and claims, at values to be determined by him.

TEXAS INSURANCE CODE
ARTICLE 21.21 §4:

UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES DEFINED. — THE FOLLOWING ARE DEFINED AS UNFAIR METHODS OR COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES IN THE BUSINESS OF INSURANCE: . . .
(7) UNFAIR DISCRIMINATION

(a) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other terms and conditions of such contract . . .

TEXAS INSURANCE CODE
ARTICLE 21.21-A

No insurance company doing business in this state shall make or permit any distinction or discrimination in favor of individuals between the insured of the same class and of equal expectation of life in the amount of the payment of premiums or rates charged for policies of life or endowment insurance or dividends or other benefits payable thereon: . . .

TEXAS INSURANCE CODE
ARTICLE 21.28 §13:

Sec. 13. Ancillary Delinquency Proceedings. When ever under the laws of this State, a receiver is to be appointed in delinquency proceedings for an insurer domiciliary in another state, a court of competent jurisdiction in this State shall, on the petition of the Board of Insurance Commissioners of this State, appoint

the liquidator herein provided as ancillary receiver in this State of such insurer. The Board shall file such petition (a) if it finds that there are sufficient assets of such insurer located in this State to justify the appointment of an ancillary receiver, or (b) if ten (10) or more persons resident in this State, having claims against such insurer, file a petition or petitions in writing with the Board, requesting the appointment of such ancillary receiver. Such ancillary receiver shall have the right to sue for and reduce to possession the assets of such insurer in this State, and shall have the same powers and be subject to the same duties with respect to such assets, as are possessed by a receiver of a domiciliary insurer under the laws of this State. The remaining provisions of this Article shall be applicable to the conduct of such ancillary proceedings.

STATEMENT OF THE CASE

The parties to this proceeding were Shearn Moody, Jr., ("Moody"), the principal shareholder, a creditor, president and chairman of the Board of Empire Life Insurance Company ("Empire"), an Alabama domiciliary insurance company placed in receivership in Alabama and Texas; John S. Bleker, an intervenor, shareholder and policyholder of Empire; Protective Life Insurance Company, ("Protective"), an intervenor and the reinsurer of Empire; and Herbert Crook, statutory insurance liquidator of the State of Texas and Ancillary Receiver of Empire.

Empire was incorporated in Alabama in June, 1963. In July 1963, Petitioner Moody assigned to Empire two/fifths (2/5ths) of his one/eighth (1/8th) life estate interest in the income from a trust created under the Will of Libbie Shearn Moody (hereinafter "the Trust Interest"). In 1964 a value of $5,813.440

for the Trust Interest was approved by the Alabama Insurance Department. In 1965 the value of the said trust interest was increased to $14,213,440 by Empire and the National Association of Insurance Commissioners' ("NAIC") zone examination of Empire. Examiners from the insurance departments of Alabama, Arkansas and Texas approved the increased valuation to $13,528,000.

From 1964 to 1968 Empire, with its principal asset being said trust interest, acquired by merger or acquisition the assets and insurance business of the following companies: Consolidated American Life Insurance Co., Chicago, Illinois (1964); Empire Life Insurance Company of America, Little Rock, Arkansas (1965); National Empire Life Insurance Co., Dallas, Texas (1966); Reliance Life Insurance Co., Dallas, Texas (1968); American Trust Life Insurance Co., Wichita Falls, Texas (1968); and Republic Life Insurance Co., Moline, Illinois (1968). All of these mergers and acquisitions were approved by the insurance departments of the aforementioned states, and predicated on the value of the trust interest of over thirteen and a half million dollars.

In 1968, the Texas Insurance Commissioner questioned whether *any* value could be given Empire's interest in the trust, but after a public hearing by the Texas Insurance Commissioner, Empire's reinsurance of American Trust Life Insurance Company was approved and Empire was found to be solvent (Defendants' Exhibit 13). This finding was predicated upon the aforementioned 1965 valuation of Empire's interest in the Libbie Shearn Moody Trust because Empire would not otherwise have been solvent.

During 1969 and 1970, the Insurance Department of Alabama conducted an examination of Empire and in June of 1969 the Honorable Frank Ussery, the then Alabama Insurance Superintendent, directed that Empire's interest in the Libbie Shearn Moody Trust be valued at $14,213,440 less a reserve of $1,292,130, to be increased annually by $430,710 (Defendants' Exhibit 30). In 1971, the Honorable John G. Bookout succeeded Mr. Ussery as Insurance Superintendent for Alabama, and suddenly, without justification directed that Empire's interest in the trust be devalued to $4,250,000. This sudden politically motivated devaluation by almost $10 million dollars rendered Empire insolvent and impaired under statutory insurance accounting principals, and deprived Moody of a large part of his inheritance which he had given to Empire to capitalize said company and for which he has received no economic benefit.

On April 5, 1972, the Texas Insurance Commissioner entered an Order of Supervision with respect to Empire in Texas. (Order No. 36707). However, on June 7, 1972, by Commissioner's Order No. 37251, the Commissioner of Insurance did not appoint a conservator under Article 21.28-A of the Texas Insurance Code, Empire having represented that it would interpose no delay concerning its rehabilitation in the receivership proceedings to be initiated against it in Alabama. Indeed, Empire's officials were assured by Bookout in Alabama that the receivership would simply provide Empire with an opportunity to get back on its feet after the staggering blow caused by the devaluation of the trust interest. The Texas State Board of Insurance took no official action concerning Empire at all

(S.F.[4] 266-272). On April 17, 1972, the then Alabama Commissioner of Insurance John G. Bookout instituted receivership proceedings against Empire in Alabama.

On June 23, 1972, the State of Texas, by and through the Attorney General of the State of Texas, "at the instance and the request of the Commissioner of Insurance of the State of Texas" filed its original Petition in the 53rd Judicial District Court of Travis County, Texas,[5] against Empire, asking that after a hearing a permanent receiver be appointed to take possession of the affairs of Empire pursuant to Article 21.28 of the Texas Insurance Code and pursuant to Subsection (a) of Section 12 of Article 21.49-1 of the Texas Insurance Code. The petition alleged that Empire, a company domiciled in Alabama, had been placed in receivership in Alabama and asked that "the receivership prayed for herein should be made ancillary to such Alabama receivership in accordance with Section 13 of Article 21.28 of the Texas Insurance Code". On July 11, 1972 the Texas court appointed a temporary ancillary receiver for Empire.

On June 29, 1972, the Alabama Court issued a Decree appointing John G. Bookout as Domiciliary Receiver for

[4]The notation "S.F." refers to the Statement of Facts in the record below. The Statement of Facts is a transcript of the testimony and exhibits introduced in the trial court below.

[5]According to a report prepared by the State Board of Insurance entitled "Insurance Companies and Affiliates in Texas in Receivership" and presented to the Governor of Texas, the 53rd Judicial District Court of Texas of Travis County received over 70% of the insurance receivership cases filed in Travis County District Courts in 1972. The 53rd received 31; the 200th had 1; the 126th had 8; the 167th had 3; the 147th had 1; the 149th had 0; the 201st had 0; and the 98th had 0. This was an unfair distribution of receiverships involving life insurance companies and their affiliates among the District Courts of Travis County in violation of the due process provisions of the Fourteenth Amendment.

Empire, and on June 14, 1974, the Alabama Court entered a decree finding, with respect to that proceeding, that Empire was insolvent and authorizing the Domiciliary Receiver to consummate a reinsurance agreement between Empire and Protective, to proceed with the liquidation of Empire, and to "proceed under this Order subject to the further review by and of this Court".

Pursuant to the Treaty of Reinsurance approved in Alabama a two million dollar slush fund was set up to finance, among other things, the prosecution of a corporate mismanagement suit against Moody predicated on Empire's losses which resulted from the precipitous Alabama devaluation of the value of the trust interest by almost ten million dollars overnight after it had been carried at over fourteen million dollars for over seven years and although said value had been approved by the insurance commissioners of at least six states, including Alabama and Texas, countless times.

In November of 1974, the State of Texas moved for summary judgment on its application for the appointment of a permanent ancillary receiver for Empire in Texas. The motion was based entirely upon the Alabama Court's decree of June 14, 1974. Shortly thereafter Herbert Crook, the Temporary Ancillary receiver moved for authority to consummate the Reinsurance Agreement. Petitioner Moody filed an Opposition to the Motion For Summary Judgment (p.A-11) and filed various affidavits in support thereof, including the affidavit of Dr. Joseph Trosper, who had prepared an evaluation of the two/fifths (2/5ths) of the one/eighth (1/8th) life estate interest in the Libbie Shearn Moody Trust.

In his Opposition, Petitioner Moody pointed out that "since most of the assets of Empire [were] located in Texas, [the

Texas] Court ha[d] a special obligation to Texas policyholders and Texas creditors to insure that whatever arrangements made [were] in the best interest of those policyholders and creditors. [U]nder the Order of the Alabama Court, all of the assets of Empire, primarily located in Texas, [were to] be lumped together, and treated as one, without any provisions for the protection of Texas policyholders and stockholders in relation to those assets." (p.A-15).[6]

The Petitioner Moody attacked any summary approval by the Ancillary Receivership Court of the reinsurance agreement approved by the Alabama Domiciliary Receivership Court, and indicated that no time had yet been set for the filing of claims against Empire. Petitioner Moody asserted the following:

> Under Section 3(a) of Article 21.28 of the Texas Insurance Code, filing of such claims shall be within the period of time as 'specified by the Court'. However, the Court, at this time, has not specified any time for the filing of such claims. The time for filing of such claims, as a matter of due process, must be prior to any determination concerning the disposition of assets by reinsurance of Empire. This is the only manner in which Texas Policyholders and creditors are given notice of the proposed disposition of assets and reinsurance agreement, and the only manner in which they may be heard on such issues and object to such proposal if they so desire. *Without such notice to Texas policyholders and other creditors, Texas policyholders and creditors would be constitutionally denied due process.* [Emphasis added]

[6]On or about April 4, 1974, Harry L. Edwards, President of National Western Life Insurance Company forwarded a proposal to the Alabama and Texas receivers whereby Empire's assets would be kept separate from its own assets and a moratorium on the cash benefits available under the reinsured policies would be 30% whereas Protective's Plan provided for the commingling of assets and an initial moratorium of 35%, which moratorium was later increased to 50%.

> *The Fourteenth Amendment of the United States Constitution requires that policyholders and creditors must be given prior notice and a hearing before assets in which they have an interest are sold.* [Emphasis added]

This is especially true in light of the following:

1. Under the terms of the said reinsurance agreement, Protective Life Insurance Company of America does not assume all the liabilities of Empire Life Insurance Company of America to its policyholders, but only a portion thereof. The reinsurance agreement provides for the transfer to Protective Life Insurance Company except $2,000,000. Accordingly, a policyholder who does not consent to reinsurance upon the terms stated in the reinsurance agreement, would be left with nothing more than an unsecured claim against Empire Life Insurance Company of America, to share with other creditors in its assets after payment of all of administration expenses.

2. All the Empire Life Insurance Company of America assets are to be lumped together and transferred outside of Texas.

3. Under the present reinsurance agreement, Empire Life Insurance Company of America assets are to be transferred to Protective Life Insurance Company when the June 14, 1974 Order is final, regardless of the fact that problems may arise later with the order or with the agreement.

Because no such notice has been given to the policyholders and other creditors as a matter of statutory and constitutional law, Plaintiffs are not entitled to Summary Judgment on the application before this Court. [p.A.17-19]

The Petitioner Moody also attacked the Reinsurance Agreement as being contrary to Alabama and Texas law because "such agreement prefers policyholders over creditors," (p.A-20).

On November 15, 1974, the Ancillary Receivership Court

granted the Motion for Summary Judgment filed by the State of Texas and appointed Herbert Crook the statutory liquidator for the Texas State Board of Insurance, permanent ancillary receiver for Empire. The court decreed that the rights of all parties interested in the proceeding were to be fixed as of June 14, 1974, the date of the Alabama decree. The court refused summarily to grant the Ancillary Receiver the authority to consummate the Reinsurance Agreement and set the matter for trial.

On or about January of 1975 Petitioner Bleker, a stockholder and policyholder of Empire was granted permission to intervene and filed a Plea in Intervention pointing out that as a policyholder of Empire he had no notice of the ancillary receiver's appointment, that the Reinsurance Agreement was unacceptable because it reduced the cash value of his policy and subjected his policy to a 35% moratorium, that he had no notice of his rights, that he had no opportunity to object to the adequacy of the two million dollar fund to pay rejecting policyholders and that in light of the foregoing he had been denied his right to due process guaranteed by the Fourteenth Amendment. He requested that no approval of the Reinsurance Treaty be had until all policyholders were notified and given an opportunity to appear.

In February of 1975 Bleker filed a motion for order vacating the appointment of ancillary receiver. In the Motion, Petitioner Bleker pointed out that the ancillary receivership court lacked jurisdiction to proceed since Article 21.28 Section 13 of The Texas Insurance Code had not been complied with, that the policyholders received no notice of the appointment of the permanent ancillary receiver in violation of their right to due process

and that the reinsurance of Empire would deprive policyholders of their right to the equal protection of the laws guaranteed by the U.S. Constitution. Petitioner Moody also filed a motion to vacate the appointment of the ancillary receiver and also attacked the jurisdiction of the trial court since Article 21.28 Section 13 had not been complied with; ie, the statute required the State Board of Insurance to institute the proceeding and *not* the Attorney General at the instance and request of the Commissioner of Insurance.

In mid-February of 1975, the Texas Ancillary Receivership Court conducted a nonjury trial on the Ancillary Receiver's Request for authority to consummate the Reinsurance Agreement, but failed to provide the policyholders, stockholders and creditors of Empire situated within the State of Texas, with notice of the hearing. During said trial, Petitioners Moody and Bleker attacked the finding of Empire's insolvency predicated on the Alabama receivership court's decree, the jurisdiction of the court to proceed because of non-compliance with Article 21.28,Section 13 and the unlawful and discriminatory impact of the reinsurance agreement upon Empire's policyholders, stockholders and creditors. On February 26, 1975, the Ancillary Receivership Court granted the Ancillary Receiver the authority to consummate the reinsurance agreement.

Petitioners Moody and Bleker appealed the Ancillary Receivership Court's Order of February 26, 1975, to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas, which cause was transferred to the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas and affirmed by that Court on May 13, 1976. The Texas

Supreme Court refused Petitioners' timely Application for Writ of Error with a notation of no-reversible error on June 22, 1977. Petitioners' timely Application for Rehearing filed in the Texas Supreme Court was overruled on July 20, 1977.

In both the Court of Civil Appeals and in the Texas Supreme Court, the Petitioners assigned as error the Ancillary Receivership Court's approval of the Reinsurance Agreement on the grounds that it unlawfully discriminated among Empire's policyholders, stockholders and creditors. The Petitioners also assigned as error the finding of insolvency predicated on the Alabama court's decree, and assigned as a denial of the due process of law guaranteed by the Fourteenth Amendment, the Ancillary Receivership Court's failure to provide the policyholders, stockholders and creditors of Empire situated within the State of Texas with notice of its hearing upon the Ancillary Receiver's application for authority to consummate the Reinsurance Agreement.

Finally, the Petitioners also assigned as serror and attacked the jurisdiction of the Ancillary Receivership Court to approve the Reinsurance Agreement since the suit was initiated by the State of Texas without the authorization or approval of the Texas State Board of Insurance as required by Section 13 of Article 21.28 of the Texas Insurance Code.

REASONS FOR GRANTING THE WRIT

I.

THE PETITIONERS HAVE BEEN DENIED THE RIGHT OF DUE PROCESS IN THAT THE RECEIVERSHIP COURT DEPRIVED THEM OF A JUST, EQUITABLE, FAIR, AND

IMPARTIAL HEARING IN VIOLATION OF THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In addition to being denied the right of notice of hearing, and the very important concomitant right to be heard, the petitioners were deprived of a just, equitable, fair, and impartial hearing on the merits. Such a right is elementary and has been described in *Corpus Juris Secundum* as follows:

> The opportunity to be heard has been required to be adequate, fair, full, or reasonable. The hearing or defense must be before a competent as well as before a just, equitable and *fair* and *impartial* court or tribunal, *full and complete*, or *on the merits*, and before trial or judgment or decree. Such a hearing has been required to be *fair, fair and impartial, full and fair.* (Emphasis added. 16A *C.J.S. Constitutional Law* §569(4)(1956).

Furthermore, a fair, impartial, and *independent* judiciary has been uniformly held to be indispensable to justice in our society. Canons 1, 2 and 3 of the American Bar Association Code of Judicial Conduct are pertinent to the case at bench. Canon 1 provides in pertinent part as follows:

> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing, and should himself observe high standards of conduct so that the conduct of integrity and *independence* of the judiciary may be preserved . . .

Furthermore, Canon 2 provides in pertinent part as follows:

> A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and *impartiality* of the judiciary.

> B. A judge should not allow his family, social, or *other relationships* to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the *impression that they are in a special position to influence him.*

Each of the above mentioned Canons of Judicial Conduct and the fundamental rights of procedural due process, including the right to receive an equitable, fair, and *impartial* hearing, was violated by the Ancillary Receivership Court. Furthermore, the Ancillary Receivership Court violated the constitutional principal of separation of powers, as enunciated in Article 2, Sec. 1 of the Texas Constitution, by allowing the State Liquidator and Receiver of the Executive Branch of State Government full and complete authority to control and determine the state court proceedings and to dictate the judgment and decision of the Receivership Court.

Clear evidence of these violations of due process and canons of judicial conduct is found in the statement in open court by Judge Herman Jones, Texas Ancillary Receivership Judge, on April 5, 1973, wherein he stated as follows:

> "But a Court who appoints a receiver gets a lot of confidence out of the fact that his receiver has asserted a claim, and I want to keep it that way. It seems to me what I am saying ought to be pretty clear to anybody. I have the highest respect for the present attorney general, every attorney general that has been here since I have been here, but it is not the Attorney General of Texas to whom this Court looks for the preservation of its receivership estate. It is to its receiver that it looks. And it ought to be able to say, *if the claim is worth anything, my receiver will assert*

> *it, and that is the relationship I want,* and I have labored this far beyond what I intended to when I mentioned it. But I think the relationship between the Court and its receiver — this Court is totally — and everybody from the receivership's offices knows it — *this court is totally helpless to know the details or even, I guess, the general outline of most of the matters* that are presented to me by the receiver, and I will say very frankly I put my name on things — they know this better than I: *I put my name on things that I am not fully conversant with, and I do it because the receivership of this court has recommended it, and I am going to continue to do that, because I have confidence in the receiver and his staff. . . . that is my view of the function of the receiver and the relationship that should exist between the receiver and the court* which appoints him. Of course, the court appoints him because he is the liquidator and is under the statute required to appoint him. (Emphasis added). (T. p. 479, 480, 481)

Such a statement is conclusive evidence of the judge's direct violation of petitioner's fundamental right of due process as described above. Rather than receiving an impartial hearing on the merits in an adversary proceeding, petitioner was helpless to exercise his fundamental constitutional rights of due process. The trial court ratified, authorized, and confirmed any and all pertinent demands and requests of the Receiver. He did so under the misconception that he served as a statutory "rubber-stamp" of the state agency, in clear and direct violation of the constitutional protectives of due process and separation of powers.

It is the *substance* and not the mere form of judicial proceedings which must be weighed in the exercise of procedural due process. If a litigant is provided a courtroom, and judge,

but is denied the opportunity of an "impartial" hearing on the "merits" he has been denied procedural due process. A Judge's courtroom statement that he signs documents for the adversary party, without knowledge or understanding of contents or effects of the documents solely because of the adversary's recommendation, is a clear abuse of judicial discretion. A more blatant denial of a "fair and impartial hearing on the merits" is difficult to imagine.

This judicial conduct permeated the entire judicial proceeding, including the Receiver's Motion for Summary Judgment on the issue of Empire Life Insurance Company's "insolvency", which ultimately resulted in the Receivership Court's approval of the subject "reinsurance agreement". Stated more simply, the court first "rubber-stamped" the Receiver's Motion for Summary Judgment and thereby deprived petitioners of the right of a fair and impartial trial of the important factual issues. After summarily deciding in 1975 that Empire Life Insurance Company was insolvent ". . . because the receivership of this court has recommended it," (T. p. 480), the court proceeded in early 1976 to approve a "reinsurance agreement" between another receiver (Alabama) and Protective Life Insurance Company. Although the subject agreement disposed of the substantial assets of the petitioners, and further, destroyed, impaired, or otherwise effected petitioners' vested contractual rights, the court failed to give *notice* of the hearing in which he approved the agreement, apparently "because, the receiver recommended it" and ". . . because I have confidence in the receiver and his staff." (T. ibid). Such judicial conduct is the very reason for the procedural safeguards of due process.

II.

THE TRIAL COURT WAS WITHOUT JURISDICTION TO HEAR AND DECIDE THE CASE IN THAT IT GAVE FULL FAITH AND CREDIT TO AN ALABAMA JUDGMENT WHICH WAS BASED UPON AN UNCONSTITUTIONAL ALABAMA STATUTE.

The issue of jurisdiction was raised early by the petitioners' in their motions to vacate the appointment of a permanent ancillary receiver and in Petitioner Moody's Opposition to Motion for Summary Judgment. Furthermore, petitioners' objection to the trial court's exercise of full faith and credit was raised in the trial court (S.F. 70-71) and on appeal and is more particularly described in petitioners' Appellate Brief in The Court of Civil Appeals and their Application for Writ of Error to the Supreme Court of Texas.

The improper and unlawful application of the doctrine of full faith and credit and comity by and between the states of Alabama and Texas merely compounded the substantial deprivation of constitutional rights suffered by the petitioners. For example, when called upon to decide the important issue of "insolvency" which was improperly and summarily determined by the trial court based upon full faith and credit given to an Alabama state court judgment, the Texas Supreme Court cited the Alabama Supreme Court decision which cited the Texas Civil Court of Appeal decision and all gave full faith and credit to each and the other.

In addition, the Texas trial and appellate courts were improper in denying petitioners the right to challenge the jurisdiction of the Alabama state court and to challenge the decision

of the Alabama state court on constitutional and extrinsic fraud grounds. Instead, the Texas courts improperly gave full faith and credit to an interlocutory Alabama state court decree, which was itself based upon an unconstitutional statute. (See Point II, *infra*). All of this occurred, despite the fact that substantially all of the assets of Empire Life Insurance Company and a majority of its shareholders and policyholders were all located in the state of Texas. Despite important contrary constitutional and legal principals, the effect of the Alabama state court interlocutory decree was to deprive each of the Texas shareholders, creditors, and policyholders of Empire Life Insurance Company of vested contractual rights and substantial assets located within the state of Texas.

A. THE SUBJECT ALABAMA STATE COURT INTERLOCUTORY DECREE TO WHICH THE TRIAL COURT IMPROPERLY GAVE FULL FAITH AND CREDIT, WAS BASED UPON AN UNCONSTITUTIONAL ALABAMA STATUTE WHICH GAVE UNLIMITED AND ARBITRARY DISCRETION TO THE ALABAMA INSURANCE COMMISSIONER TO VALUE THE SUBJECT EMPIRE LIFE INSURANCE COMPANY ASSET AT ANY VALUE TO BE DETERMINED BY HIM.

The entire question of Empire Life Insurance Company's "insolvency" arose by Alabama Insurance Commissioner, John Bookout's determination that the life estate trust interest of Empire Life Insurance Company in the Libbie Shearn Moody Trust was to be arbitrarily devalued from $14,000,000 to approximately $4,250,000. Commissioner Bookout's authority

to make such an arbitrary determination was based upon Section 745 (13) which statute provides as follows:

> Sec. 745: "ASSETS" DEFINED. In any determination of the financial condition of an insurer, there shall be allowed as assets only such assets as are owned by the insurer and which consist of:
>
> (13) Other assets, not inconsistent with the provisions of this section, deemed by the Commissioner to be available for the payment of losses and claims, *at values to be determined by him.* (Emphasis added)

The value of $14,000,000 has been previously approved in 1965 by Alabama Commissioner Roussel and in 1968 by Alabama Commissioner Ussery, and by other insurance commissioners in the state of Texas and in the state of Arkansas. Yet, despite all of the prior approvals and despite Empire Life Insurance Company's reliance thereon, and business activity for more than seven years in reliance upon said prior valuations, Commissioner Bookout arbitrarily made this unconscionable devaluation and used as his sole authority therefor the abovementioned insurance code section, which is totally devoid of standards, guidelines, or other limitations. The arbitrary devaluation of more than $10,000,000 resulted in a unique insolvency under the very narrow and limited statutory insurance accounting principles. Despite the improper devaluation by Commissioner Bookout, Empire Life Insurance Company remained solvent and in good financial condition under the more commonly accepted, "generally acceptable accounting principles" and other forms of accounting.

It should be noted that Sec. 745(13) became effective January 1, 1972. There was no such code provision prior to said date which gave any of Commissioner Bookout's predecessor

commissioners such unlimited and totally arbitrary discretion, without standards of any kind.

It is the general principal of statutory law that a statute must be definite and certain to be valid. Furthermore, it has uniformly been held that a law violates due process if it is so vague and standardless that it leaves the public uncertain as to the conduct thereby prohibited, or leaves judges and juries free to decide without any legally fixed standards, what is prohibited and what is not in each particular case. (*Giaccio v. State of Pennsylvania*, 387 U.S. 399, 86 S.Ct. 518). If Empire Life Insurance Company was wrong in valuing the trust interest at $14,000,000, or in the alternative, was wrong by accepting the various state insurance commissioner's approval of the $14,000,000 valuation, then certainly they are entitled to clear and express standards in the Alabama Insurance Code upon which to base their conduct. Absent such standards, it is reasonable that they would accept and rely upon prior approval by the states of Alabama, Texas and Arkansas.

It is an elementary principal of law that an unconstitutional statute is void and unenforceable and has no legal effect. The same uniform principal of law is followed in the state of Texas and is more particularly described as follows:

> It is the general rule that an unconstitutional statute, though having the form and name of law, is in reality no law and in legal contemplation is an inoperative as if it had never undergone the formalities of enactment. Such a statute leaves the question that it purports to settle just as it was prior to its ineffectual enactment. *It is invalid and it imposes no duties, confers no rights*, creates no office, *bestows no power*, affords no protection, and *justifies no acts performed under it.* (Emphasis added) (12 *Tex. Jur.* 2d 391) *Miller v*

> *Davis*, 136 Tex. 299, 150 S.W.2d 973, 136 A.L.R. 177, *Colden v Alexander*, 141 Tex. 134, 171 S.W. 2d 928.

B. THE APPLICATION AND ENFORCEMENT OF SECTION 745 (13) BY THE ALABAMA STATE COURT DEPRIVED PETITIONERS OF SUBSTANTIAL CONTRACTUAL AND PROPERTY RIGHTS IN VIOLATION OF DUE PROCESS, AND, THE IMPROPER GRANTING OF FULL FAITH AND CREDIT BY THE TRIAL COURT FURTHER COMPOUNDED PETITIONER'S DENIAL OF DUE PROCESS.

It is an undisputed fact in the case at bench that prior to Alabama Insurance Commissioner Bookout's improper devaluation of the trust interest of Empire Life Insurance Company, said insurance company relied upon prior approvals of the $14,000,000 trust valuation by prior Alabama insurance commissioners and commissioners of the states of Arkansas and Texas. Furthermore, it is undisputed that from 1965 to 1972, petitioners and other shareholders and policyholders of Empire Life Insurance Company obtained vested and substantial contractual rights and property rights on the basis of the $14,000,000 approved valuation.

The subsequent enactment, in 1972 of Section 745(13) of the Alabama Insurance Code, and the subsequent devaluation by Commissioner Bookout, effectively destroyed, impaired and otherwise deprived said petitioners, shareholders, creditors and policyholders of Empire Insurance Company of their substantial vested property and contractual rights.

It is an elementary principal of federal and state constitutional law that once one has become possessed of a property right created by law, the legislature may not deprive him of

that property right by changing the law, *Middletown v. Texas Power & Light Co.*, 108 Tex. 96, 185 S.W. 556 (1916); *International & G.N.R. Co. v. Edmondson (Com.)* 222 S.W. 181 (1920); *Arnold v. Sherman* 244 S.W. 2d 880 (Tex. Civ. App. — Dallas 1951, writ ref'd n.r.e.)

It has also been uniformly held that vested rights may not be destroyed or impaired, and an enactment that would effect a destruction or impairment of a vested right is invalid. *State v. Mitchell*, 110 Tex. 498, 221 S.W. 925 (1920); *Miller v. Letzerich*, 121 Tex. 248, 49 S.W. 2d 404, 85 A.L.R. 451 (1932).

Therefore, if Section 745 (13) is relied upon by Alabama Commissioner Bookout as authority for him to arbitrarily devaluate substantial assets of Empire Life Insurance Company and thereby impair, destroy, or otherwise deprive individuals of vested contractual and property rights, said authority is invalid and constitutes a violation of Article I Section 10 of the U.S. Constitution.

Although petitioners attempted to raise all of the above objections in the trial court, they were precluded from doing so by virtue of the trial court's granting of full faith and credit to the Alabama state court decree. The granting by the trial court of full faith and credit did not cure the fatal defects and unconstitutional deprivations suffered by the petitioners as mentioned above.

III.

THE FAILURE OF THE ANCILLARY RECEIVERSHIP COURT TO PROVIDE THE POLICYHOLDERS, STOCKHOLDERS AND CREDITORS OF EMPIRE WITHIN ITS

JURISDICTION WITH NOTICE OF THE ANCILLARY RECEIVER'S PETITION FOR AUTHORITY TO CONSUMMATE THE TREATY OF ASSUMPTION AND BULK REINSURANCE, OF THE HEARING THEREON, AND AN OPPORTUNITY TO BE HEARD AT SAID HEARING DEPRIVED THEM OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW CONTRARY TO THE FOURTEENTH AMENDMENT.

No notice whatsoever was provided to Empire's policyholders, stockholders and creditors situated within the State of Texas of the Ancillary Receiver's Petition For Authority To Consummate the Treaty of Assumption and Bulk Reinsurance, or the hearing thereon, nor were they provided with an opportunity to appear and object to the same.

> [Petitioners' Counsel] But you never gave any notice concerning this receivership in Texas, did you?
> [Ancillary Receiver] No [S.F. 130 Feb. 1975 Trial]

Petitioner Moody specifically asserted in his Opposition to the Receiver's application that the failure to notify Empire's policyholders, stockholders and creditors of said application denied them the due process of law guaranteed by the Fourteenth Amendment. (A-18, A-19). Petitioner Bleker, a policyholder, indicated in his Plea of Intervention that he had *no* notice of the appointment of an ancillary receiver and requested that the court give policyholders an opportunity to appear at the hearing on the Treaty. But the court refused to do so! Given the fact that a majority of Empire's policyholders and assets are within Texas, such blatent denial of the basic elements of due process, notice and an opportunity to appear, is simply incredulous and taints the entire ancillary proceeding.

All the Reinsurance Agreement provides is that the policyholders, *after* the Reinsurance Agreement has been approved and implemented. are notified that they can accept the agreement or elect to be a general creditor in a fund that is likely to be quite insufficient to give them what they previously bargained for. In either case they will be forced to take less than their contractual rights under their policies.

It is the general rule in receiverships that no action may be taken against any party in interest unless that party is given notice and an opportunity to be heard on the matter. *2 Couch on Insurance 2d*, Section 22:52 (1960). *Salas vs. Gonzalez*, 181 S.W.2d 821 (Tex.Civ.App.-San Antonio 1944, no writ); *Marion vs. Marion* 205 S.W.2d 426 (Tex.Civ.App.-San Antonio, 1947, no writ). When faced with the interpretation of regulatory schemes governing liquidation and reinsurance, the courts have indicated that due process requires that the judiciary should attempt to afford the affected parties the fullest opportunity for a hearing consistent with the protection of the public interest. *Stewart vs. Citizens Casualty Co. of New York*. 23 N.Y.2d 407, 244 N.E.2d 690, 692 (1968); *Britton v. Green*, 325 F.2d 377 (10th Cir. 1963); *Morris v. Investment Life Ins. Co. of America*, 204 NE2d 550, 1 Ohio App. 2d 330 (1960); *Lucas vs. Manufacturing Lumbermans Underwriters*, 349 Mo. 835, 163 S.W.2d 750 (1942).

Under the Texas Insurance Code, the only provision for action to be taken without notice is where the issuance for an injunction restraining the insurer or others from wasting or disposing of the company's property pending further order of the court. Tex. Ins. Code Ann. art. 21.28, Section 4(a)(2). Under subsection 2, the court may enter such other injunctions or orders as

may be necessary to prevent interference with the proceedings, the obtaining of preferences, etc. Nothing is said about other orders without notice. Thus, notice should be given for action under these provisions. Notice is further required to be given to all "claimants". Tex. Ins. Code Ann. art. 21.28(3). In the present action, no notice was given to Empire's policyholders, stockholders or creditors situated within the State of Texas of the February, 1975 hearing on the Ancillary Receiver's application for authority to consummate the Treaty of Assumption and Bulk Reinsurance.

Although there is no express statutory provision one way or the other concerning notice to policyholders before reinsurance and liquidation, certainly from the above general statutory scheme, it is evident that such notice should have been given, not only as a matter of Texas law, but also as a matter of Federal constitution law. Indeed, in passing upon The Reinsurance Agreement, the Alabama Supreme Court expressly noted that "Approximately one-half of the Empire policyholders reside in Texas, and most of Empire's physical assets are located in that state." *Moody v. State of Alabama*, 344 So.2d 160 (1977). Evidently the Alabama Supreme Court felt compelled to refer to the opinion of the Texas Court of Civil Appeals below since a majority of Empire's assets and policyholders are in Texas. In light of this fact, the issue of procedural due process in the present proceeding becomes extremely significant. Query? Should policyholders, creditors and stockholders in Texas have the assets of their company removed from the state without an opportunity to appear at a hearing and object to the same? At a minimum, this is exactly what the notion of due process requires.

This court, in a series of cases has made clear that the state

cannot participate in the interference with or the taking of individual property interests without prior notice and opportunity for hearing. *Goss vs Lopez*, 419 U.S. 565, 95 S.Ct. 729, (1975); *Wisconsin vs. Constantineau*, 400 U.S. 433, 91 S.Ct. 507 (1971); *Boddie vs. Connecticut*, 401 U.S. 371, 91 S.Ct. 780 (1971); *Board of Regents vs. Roth*, 408 U.S. 564, 92 S.Ct. 2701, (1972); *Fuentes vs. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, (1969).

In *Mullane vs. Central Hanover Trust Co.*, 339 U.S. 306, 70 S. Ct. 652 (1950), this Court indicated that the "words of the due process clause . . . . require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane, supra*, 339 U.S. at 313. "The fundamental requisite of due process of law is the opportunity to be heard," *Grannis vs. Orlean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783 (1914). A right "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . . contest." *Mullane, supra.* 339 U.S. at 314, 70 S. Ct. at 657.

In *Fuentes vs. Shevin, supra.*, this Honorable Court held that a state replevin statute which allowed a Plaintiff to recover property from a Defendant, summarily without notice to the Defendant, and an opportunity for a hearing, violated the due process clause of the Fourteenth Amendment. Similarly, in *Goldberg vs. Kelly*, 387 U.S. 254, 90 S.Ct. 1011 (1970), this Court held that a state was without power to deprive a family on welfare of their vested expectancy in welfare checks without giving the recipient prior notice and an opportunity for a hearing prior to the cutoff period.

The present case is no different from these previous Supreme Court cases. Policyholders, stockholders and creditors in the present action were not given notice of the Ancillary Receiver's application to consummate the Treaty of Assumption and Bulk Reinsurance of the hearing thereon or with an opportunity to appear. Clearly, the due process clause of the Fourteenth Amendment required notice to Empire's policyholders, stockholders, and creditors within the state of Texas and an opportunity to appear at the hearing and raise objections to the proposed Treaty of Assumption ad Bulk Reinsurance.

Further, since Empire's policyholders were not provided with notice of the Ancillary Receiver's Application for Authority to Consummate the Reinsurance Agreement and accordingly were not provided with a reasonable opportunity to object to the Treaty, the objections of Petitioners Moody and Bleker, a policyholder, with regard to the lack of notice on behalf of the policyholders should have been entertained by the Court of Civil Appeals below. "The principal [pertaining to standing] is not disrespected where constitutional rights of persons who were not immediately before the court could not be effectively vindicated except through an appropriate representative before the court." *N.A.A.C.P. vs. State of Alabama*, 78 S.Ct. 1163, 1170, 357 U.S. 449, 458 (1958); *Swan vs Adams*, 87 S.Ct. 569, 385 U.S. 440 (1967); *Barrows vs. Jackson*, 73 S.Ct. 1031, 346 U.S. 249 (1953); *Pierce vs. Society of Sisters*, 45 S.Ct. 571, 268 U.S. 510 (1925).

IV.

THE TREATY OF ASSUMPTION AND BULK REINSURANCE DENIED THE POLICYHOLDERS, STOCKHOLDERS

AND CREDITORS OF EMPIRE THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT BY TREATING DIFFERENTLY THOSE POLICYHOLDERS, STOCKHOLDERS AND CREDITORS WHO WERE SIMILARLY SITUATED AND BY FAILING TO TREAT THOSE WHO WERE DIFFERENTLY SITUATED IN A MANNER CONSISTENT WITH THEIR RESPECTIVE RIGHTS.

Shortly after Empire was placed in receivership in the State of Alabama in 1972, the Alabama Trial Court directed the Domiciliary Receiver, John G. Bookout, to take whatever action was necessary to rehabilitate Empire and to solicit proposals for its rehabilitation. Tom McFarling, the then temporary Ancillary Receiver for Empire in Texas, petitioned the Ancillary Receivership Court for authority to approve a plan of rehabilitation with regard to Empire. On February 9, 1973, the Texas Ancillary Receivership Court approved a plan of rehabilitation with regard to Empire that had similarly been approved and adopted by the Alabama Domiciliary Receivership Court.

During the period that Empire was to be rehabilitated, Mr. Clay Cotten, former Texas Commissioner of Insurance, wrote the Domiciliary Receiver, Bookout, and instructed him that any rehabilitation of Empire would be unacceptable. Outrageously enough, the Texas and Arkansas Ancillary Receivers also communicated their adamant opposition to rehabilitation of Empire, not only to the Domiciliary Receiver, but also in ex parte fashion to the Domiciliary Receivership Court.

Indeed, in the early part of 1974, an Assistant Attorney General in the office of the Attorney General of the State of

Texas expressed "alarm" at having heard that Judge Barber, the Domiciliary Receivership Court had announced his inclination to appoint "an administrator" for Empire Life for the sole purpose of rehabilitating the company. The Assistant Attorney General outlined in an inter-office communication (See Addendum to Petition) that "if he [the Domiciliary Receivership Court] does not back down from his ridiculous notion of appointing an "administrator", we can deal with the problem before his Order becomes final."

It is obvious from the foregoing that the State of Texas had no intention of making a good faith effort to rehabilitate Empire in accordance with the plan of rehabilitation approved by the Ancillary Receivership Court in February of 1973, but instead chose to persist in demanding the liquidation of Empire. As a result, the liquidation of Empire ensued and a Treaty of Assumption and Bulk Reinsurance was approved which treated differently those Empire policyholders and creditors who were similarly situated and failed to treat those who were differently situated in a manner consistent with their rights.

The response of the Texas Court of Civil Appeals to the Petitioners' attack upon the unlawful preferences and discriminatory treatment effected by the Reinsurance Agreement was that the differences in treatment were not unlawful discrimination because of the different contractual relationships which various groups of policyholders and creditors have had with Empire. However, the record below was barren of any such differences. It is clear therefore that the axiom asserted by the Court of Civil Appeals assumed the very issue in dispute: whether the differences between the various groups of Empire's policyholders and creditors are "real and substantial differences"

justifying the preferential and discriminatory treatment accorded those groups under the Reinsurance Agreement.

The Petitioners respectfully submit that the Reinsurance Agreement as amended does not reflect the proper application of the principle cited by the Court of Civil Appeals, since it not only fails to treat those who are differently situated in a manner consistent with their rights, but it also unlawfully discriminates among the policyholders and creditors of Empire who are similarly situated. Thus, the Reinsurance Agreement denies Empire's policyholders, stockholders and creditors the equal protection of the laws guaranteed by the Fourteenth Amendment.

In insurance company receivership proceedings, it is the general rule that both policyholders and general creditors are entitled to share pro rata in the distribution of the assets of the company. *See, Clark v. Williard*, 292 U.S. 112 (1935). The purpose of the insurance company receivership acts, much like the Bankruptcy Act, is to put all claimants, including both policyholders and general creditors, on an equal footing and to prohibit preferential treatment for any of the parties. See 2 *Couch on Insurance 2d*, §22.82, pp 775-780 (1960). Policyholders are general creditors of an insurance company in receivership, and as such are entitled to share ratably in the distribution of the assets of the company. *Palmer, ex rel. American Bankers Ins. Co. v. Palmer*, 363 Ill. 499, 2 N.E.2d 728, 106 A.L.R. 447 (1936). Policyholders are also expressly prohibited from receiving any preferential treatment.

In Alabama, the procedure for the liquidation of insurance companies and the payment of creditors thereunder is governed by the Alabama Insurance Code, Title 28-A, Sections 621-641. This provision is, with some modification, the Uniform Insurers

Liquidation Act and became effective in Alabama on January 1, 1972. It is without question that the purpose of the Uniform Insurers Liquidation Act is to achieve equality among claimants. 2 *Couch on Insurance 2d*, Section 22:28, p. 702 (1960); *Ace Grain Company v. Rhode Island Insurance Company*, 197 Supp. 80 (1952), *aff'd*. 199 F. 2d 758 (2d Cir.); 46 A.L.R. 2d 1185.

The Alabama rule against preferential treatment was made clear in the case of *Melco Systems v. Receivers of Transamerica Insurance Company*, 105 So.2d 43 (Ala. 1958). In that case a reinsurer had agreed to pay a certain sum for its liability under a reinsurance agreement with an insurance company in receivership. The Supreme Court of Alabama held that the proceeds of the reinsurance agreement constituted general assets to which the plaintiff insured had no priority over other creditors. All creditors had to share equally in the assets of the company and this included policyholders. As that court stated:

> No subsequent act of the liquidating agent in the course of his duties as trustee can give one creditor a preference over others of like class . . . Equality is equity.

See also Art. 1040, 1975 Alabama legislature session prohibiting preferential treatment.

Texas has not adopted the UILA. Nevertheless, the Texas courts have made it clear that in Texas all creditors of an insolvent insurance company must share equally in the distribution of the assets of that company, and that no creditor or policyholder is entitled to preferential treatment in receivership proceedings. *McFarling v. Mayfield*, 510 S.W.2d 108 (Tex. Civ.

App-Beaumont 1974, writ ref'd. n.r.e.). In that case the Court of Appeals held that judgment creditors against an insolvent insurance company were not entitled to direct payments from the proceeds of a reinsurance agreement since to do so would be to prefer those creditors over others. As that court held at 109:

> Generally, all creditors of an insolvent insurance company are entitled to share equally, 44 CJS 733, Insurance §134 (1945); 75 CJS 919, Receiver §283 (1952). Art. 21.28-B, V.A.T.S. The "Loss Claimants Priorities Act", (60th Leg. 1967) gives appellees a preferred claim, but no statutory authority is given for the preference granted by the trial courts judgment. Reversed and rendered.

Not only is preferential treatment of certain claimants unlawful under Texas and Alabama law, but to the extent that one claimant is preferred, others are discriminated against. Such discrimination between policyholders of the same class is unlawful TEX. INS. CODE ANN. art. 21.21 §4(7), Art. 21.21-A; ALA. INS. CODE TITLE 28A §237. Where this discriminatory treatment is being accomplished by state action and has no rational or reasonable basis, it is also in violation of the Equal Protection Clause of the United States Constitution. *See, e.g., Weber v. Aetna Gas & Ins. Co.*, 406 U.S. 615, 92 Ct. 1400 (1972).

The applicable principle regarding the equal protection of the laws guaranteed by the Fourteenth Amendment was set forth by Mr. Justice Reynolds in *Hartford Steam Boiler Inspection & Ins. Co.*, 301 U.S. 459 (1957) in an excerpt cited from *Louisville Gas & Electric Company v. Coleman, Auditor*, 277 U.S. 32, 37, 38, 48 S.Ct. 423, 425, 72 L.Ed. 770 (1928):

> 'It may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, [citations omitted] and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation. [citations omitted]. It does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility provided always that the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' [citations omitted] That is to say, mere difference is not enough; the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' [citations omitted]. Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision. [citations omitted].

See also, Barbier v. Connolly, 113 U.S. 27, 31, 5 S. Ct. 357 (1885).

The rule against preferential and discriminatory treatment of any claimant, whether a policyholder, creditor, or otherwise, is important in the present case because it is clear from review of the Reinsurance Agreement between Protective and Empire that the agreement effects such preferential and discriminatory treatment, and there is absolutely nothing in the record to justify such treatment.

Indeed, the Petitioners would assert that the transfer of Empire's assets as reserve funds to Protective under the Rein-

surance Agreement is, in itself, a preferential transfer which unlawfully discriminates among Empire's creditors and policyholders contrary to both Texas and Alabama law. Although the Texas Legislature has indicated that in proceedings instituted against out-of-state insurance companies under Article 21.28-A Section 6 of the Texas Insurance Code, a transfer of assets as reserve funds to a reinsuring company by a conservator shall not be deemed a preference of creditors, no comparable provision exists allowing such a preferential transfer by a receiver in the present receivership proceeding instituted under Article 21.28 Section 13 of the Texas Insurance Code. Thus, the transfer of Empire's assets as reserve funds to Protective under the Reinsurance Agreement is, in itself, a preferential transfer unlawfully discriminating among Empire's creditors and policyholders.

As the largest single stockholder of Empire and as a creditor of Empire (S.F. 164, 264, 1278), Petitioner Moody clearly has a substantial interest in attacking a reinsurance agreement which deprives stockholders of their entire equity without providing them with any benefits in return (S.F. 253, 814) and which deprives creditors of their contractual rights with Empire. The Texas Supreme Court has indicated that in receivership proceedings the stockholders and creditors of an insolvent corporation are parties in interest and as such are, in effect, parties to the proceeding bound by all decrees rendered therein. *Shaw v. Strong*, 128 Tex. 65, 96 S.W.2d 276 (1936). The Receiver is "the representative and protector of the interest of all persons, including creditors, shareholders and others, in the property in receivership." *Security Trust Company of Austin v. Lipscomb County*, 142 Tex. 572, 180 S.W.2d 151 (1944). "The general

rule is that when a court takes control and custody of the property of a corporation by the appointment of a receiver, all creditors of the corporation are in effect or constructively before the court; . . ." *Security Trust Company of Austin* at 157-8 and authorties cited therein.

When Moody assigned the two-fifths (2/5) of a one-eighth (1/8) life estate interest in the Libbie Shearn Moody Trust to Empire he received in exchange therefor a $221,000 debenture (S.F. 1278). Moody has also filed two claims against the receivership estate totalling approximately $2,000,000, one of which was filed on behalf of W. L. Moody & Company Bankers (Unincorporated) (S.F. 164). Thus, Moody is clearly a creditor and an interested party in the receivership proceeding having the requisite standing to attack any action by the ancillary receivership court. "The appointment of a receiver is not made for the purpose of destroying the rights of persons, but rather that their rights be made more secure." *Cocke v. Wright*, 299 S.W. 446, 448 (Tex. Civ. App. — Dallas 1927, no writ).

As an interested party whose rights as a stockholder and creditor of Empire are being destroyed or significantly reduced by the Reinsurance Agreement, Moody clearly has standing to complain of its discriminatory treatment. As a policyholder and stockholder of Empire, Petitioner Bleker's standing is obvious. These discriminatory features are set forth below.

1. *Unfair Discrimination Against Policyholders Rejecting Reinsurance.*

One obvious element of preferential treatment given by the Reinsurance Agreement is to prefer policyholders who accept the Reinsurance Agreement over those who do not. Under Sec-

tion XIV of the Reinsurance Agreement (Receiver's Exhibit 6, P. A-56), it is provided that all policyholders who do not reject the reinsurance assumption in writing within 60 days after notice are deemed to have accepted the Reinsurance Agreement and all the terms thereof. They are further deemed to have agreed to have allowed Protective to file claims with the Receiver in the amount of the total moratoriums placed on the policies. Any amount received by Protective from the Receiver pursuant to these claims is, under the Reinsurance Agreement, to be added by Protective to the Empire fund and this amount will accrue to the benefit of the policyholders whose policies are reinsured. Policyholders who thus consent to the reinsurance have the benefit of the reinsurance and, in addition, have the benefit of a claim against the fund in the hands of the Receiver. On the other hand, policyholders who reject the assumption are left with nothing but a claim against the fund. Policyholders who accept thus have two bites of the apple; policyholders who reject have but one (S.F. 195). Certainly this is preferential treatment to policyholders who accept the Reinsurance Agreement under any sense of the words, and is contrary to both Texas and Alabama law.

Unfortunately, for policyholders who reject the Reinsurance Agreement, there is even no guarantee that they will have one bite of the apple. There has been no determination as to whether the $2,000,000 fund left with Empire to pay general creditors, rejecting policyholders, and the expenses of administration would be sufficient to pay such claimants roughly the same thing being given to accepting policyholders, i.e., approximately 65% of what they are entitled to (*See* S.F. 699, 797). Indeed, the blatant inadequacy of the $2,000,000 fund is underscored by Empire's

1973 Annual Statement which reflects liabilities of approximately $37,000,000 of which $31,000,000 were reserves (Defendants' Exhibit 23 below). This means that the general creditors whose claims represent $6,000,000 of Empire's liabilities will have to rely upon the balance of the $2,000,000 fund to satisfy their claims after the expenses of administration are first paid from the $2,000,000 fund. In the hearing on the Ancillary Receiver's application for authority to consummate the reinsurance agreement, Herbert Crook, the Ancillary Receiver, admitted that at the time of the hearing no computation had been made of the total amount of claims against the receivership estate (S.F. 162). When confronted with the question of whether he had computed the amount of such claims at the time he had determined that the Reinsurance Agreement was in the best interest of Empire's policyholders and creditors, the Ancillary Receiver candidly admitted: "Not the total amount, no" (S.F. 164).

Indeed, the Petitioners would submit that a prior determination as to the adequacy of the $2,000,000 fund was mandated as a matter of both Texas and Alabama law in order to prevent unlawful discrimination against the rejecting policyholders and creditors who must rely on the fund to satisfy their claims. In *Melco Systems v. Receivers of Transamerica Inc. Co., supra,* Employers, the reinsurer of Trans-America had agreed to compromise the claims against Transamerica by paying $130,000 to the receiver provided that this amount settled all claims against Employers by Transamerica, its receiver or any other persons, arising out of the reinsurance contract.

After a hearing and testimony, the trial court held that it was in the best interest of the receivership to accept the com-

promise offer of $130,000. The Alabama Supreme Court affirmed the holding of the trial court with the following statement:

> We must assume that the trial court, in approving the compromise, took into consideration the probable validity of Employers' claims, the difficulty of enforcement by the receivers, the collectibility of any judgment recovered, the delay, expense and trouble of litigation, and the amount of the compromise offer as compared with the amount and collectibility of various judgments in favor of the receivers against Employers.

In the present proceeding, however, there has been absolutely no determination by the Domiciliary receivership court or the Ancillary receivership court below as to the adequacy of the $2,000,000 fund to satisfy the claims of Empire's rejecting policyholders and creditors and to pay the expenses of administration. Certainly this accords preferential treatment to accepting policyholders and unlawfully discriminates against rejecting policyholders who simply have no guarantee that they will receive the amount to which they are entitled.

In the proceedings before the Ancillary receivership court below, Herbert Crook testified that Protective's right to file a claim on behalf of consenting policyholders against the $2,000,000 fund was conditioned upon the event that the rejecting policyholders and other claimants received a dividend or more than the value of reinsurance initially allocated to accepting policyholders (S.F. 192). Yet, Mr. Crook candidly admitted that the Reinsurance Agreement contains no provision expressly conditioning such right on the part of Protective to file a claim on behalf of consenting policyholders to such a situation (S.F. 193). Accordingly, such right is also an instrument of potential discrimination.

In response to the Petitioners' argument regarding the unlawful discrimination against rejecting policyholders, the Court of Civil Appeals has asserted that: "Different treatment as a result of a voluntary election can hardly be classified as arbitrary or unfair discrimination." [p. A-4]. Yet, it is difficult to understand how an election to reject reinsurance can be characterized as "voluntary" when a policyholder has no information other than an Assumption Certificate and a letter from Protective to determine whether he will receive fair and equal treatment. If neither of the receivership courts nor the receivers knew whether the $2,000,000 fund would be sufficient to handle all of the claims against Empire, how could a policyholder be assumed to know? Thus, the Court of Civil Appeals clearly erred as a matter of law in holding that the $2,000,000 fund left with the Receiver would be sufficient to satisfy equitably the claims of Empire's general creditors and rejecting policyholders. Given the absence of a rational basis for the discrimination described above, the policyholders and creditors of Empire have been denied the equal protection of the laws guaranteed by the Fourteenth Amendment.

2. *Unfair Discrimination Against Creditors Whose Claims Are Not Assumed by Protective.*

Under the Reinsurance Agreement, Protective does not assume all the liabilities of Empire. Liabilities that were not assumed are set forth in Section VI G of the Agreement and include claims of creditors, claims for dividends on certain policies, the obligations of liability for certain commissions, unpaid premium taxes, and any deficiency obligation respecting mortgages (Receiver's Exhibit 6 p. A-37). Unfortunately, there has been

no computation of the amounts of liabilities not assumed and therefore, the trial court had no way of knowing that the creditors whose debts were not assumed will receive more or less than those whose debts were assumed. This is clearly an unlawful and discriminatory preference against the creditors whose claims are not assumed and who must confront the reality that no determination has been made as to the adequacy of the $2,000,000 fund to satisfy the claims of Empire's creditors (S.F. 699).

For example, Section VI G, paragraph 8, indicates that the non-assumed debts include any deficiency with respect to mortgaged real estate. The annual statement of Empire for the year ending on December 31, 1973 (Defendants' Exhibit 23 below) reflects that Empire had mortgage loans on its home office building in Dallas and other properties. But there was no determination made as to whether there might be any deficiency and if so, the amount. Presumably if any such deficiency does exist, it would consume a large portion of the $2,000,000 reserve fund. Further, under Section VI G, paragraph 3, [p. A-38] the obligation of Empire to W. L. Moody and Company under a guaranty agreement for about $700,000, as reflected in the 1973 annual statement, is also a non-assumed debt which will consume a significant portion of the reserve fund. The foregoing highlights not only the blatant inadequacy of the $2,000,000 reserve fund to satisfy the claims of Empire's creditors, but it also underscores the unfair discrimination being accorded to creditors of Empire whose debts are not assumed by Protective. Indeed, under the axiom asserted by the Court of Civil Appeals, unless a significant difference can be shown to exist between the creditors whose claims are assumed and those whose claims are

not assumed, the difference in treatment accorded to those creditors whose claims are not assumed is a violation of the Equal Protection Clause of the Fourteenth Amendment. The truth is there is no reason for the difference in treatment of Empire's creditors, and the ancillary receiver failed to prove any justification for the preferential treatment.

3. *Discrimination Regarding Pending Claims.*

Under Section VI G of the Agreement, Protective assumes only the claims against Empire that have been accepted by Empire or which are pending as of the effective date of the Agreement. Protective does not assume claims that Empire has previously rejected, whether or not such claims are pending in court. This is clearly unlawful discriminatory treatment which the Court of Civil Appeals failed to discuss with respect to valid claims which have been rejected by Empire and preferential treatment with respect to the others. Again, no reason exists for such differential treatment.

4. *Unfair Discrimination Against Empire's Agents.*

Further, the Agreement provides in Section VI that Protective assumes Empire's liability for agent's commissions on premiums paid to June 29, 1972. But Protective assumes no liability for the payment of commissions to agents for premiums collected after June 29, 1972. Certainly this provision unlawfully discriminates against Empire's agents as creditors and prefers other creditors and certain agents' claims (S.F. 699, 811). Moreover, the significance of the date June 29, 1972 was never explained.

5. *Unfair Discrimination in the Application of Different Moratorium Amounts to Different Policyholders.*

Concerning preferential treatment of certain policyholders, the Reinsurance Agreement gives certain policyholders more than others, and gives certain policyholders less. For example, the Reinsurance Agreement, Section VIII, (A-47) provides that the moratorium is 35% of the *withdrawable* funds of certain specified policies; 35% of the *total value* of certain separate accounts of other policies; and 35% of the *net reserves* of certain policies. This obviously results in different treatment for different classes of policyholders. However, there was no showing in the trial court that the different contractual relationships justified such treatment.

Indeed there is no definite evidence on how the 35% moratorium was arrived at. Mr. Pennington, Vice-President and actuary of Protective, did make several projections on the Empire business. (See Defendants Ex. No. 11). According to his projections, the business of Empire would be sufficient to eliminate the moratorium in a ten year period, if not sooner. He testified that Protective expects to make a profit on the Empire policies of one-half of a million dollars per year for 10 to 15 years after the moratorium is eliminated. (S.F. 1415).

According to Empire's 1973 Annual Statement, (Defendants' Ex. No. 23), it had $31,000,000.00 of statutory assets and approximately $36,000,000.00 of liabilities. Had the moratorium been calculated according to even the deficiency in Empire's Annual Statement, the deficiency would be about 39 to 36, and the moratorium would be about 20%. (S.F. 643). Thus even according to Empire's statutory financial position, there should be no justification for a moratorium of greater than 20%, rather than the 35% imposed by the Reinsurance Agreement.

Indeed, such a computation, and even the computation made by Protective gives no consideration at all for the value of business in force of Empire. According to the Stennis Report, the value of that business is approximately $6,000,000.00 (Defendants' Ex. No. 10). Thus Protective is entering into an agreement to assume assets of Empire which by Protective's own projections are sufficient of their own to reduce the moratorium placed on the policy by ten years, if not sooner. At the end of this period of time, Protective gets the full value of the Empire business, for which it pays essentially nothing (See S.F. 678, 794). Even a 20% moratorium would not give sufficient consideration for the value of the Empire business. Moreover, no moratorium would give sufficient consideration to the actual value of the Libbie Shearn Moody Trust (S.F. 643). According to the valuation made by Dr. Joseph Trosper, Professor of Insurance at Indiana University, that interest has a value of not less than approximately $14,000,000.00 (Defendants Ex. No. 14). If Empire's trust interest has such a valuation, there is no need for any moratorium; indeed there is no need for a Reinsurance Agreement at all. (S.F. 791).

Moreover, Protective is given the benefit of certain assets which have a value greater than the statutory carrying value. For example, certain subsidiaries are valued and transferred at the book value though the actual value of these subsidiaries are probably much greater (See S.F. 813).

Adding all this up, the conclusion is that Protective is getting such a good deal that they cannot afford to pass it up. Mr. Pennington projected a profit to Protective of 5-7½ million dollars from the Reinsurance Agreement. (S.F. 1415). This is obviously at the expense of Empire's policyholders, creditors

and stockholders. Had the moratorium been based on an asset to liability ratio, which should have been done, the moratorium, according to the statutory statement, would only be 20% (S.F. 794, 795). Had proper value been given to the business of Empire, the subsidiaries and other assets of Empire, and the life estate interest of Empire, there would be no moratorium needed; in fact there would be no Reinsurance Agreement despite the fact that each item of benefit to Protective amounted to a greater diminution of policyholders rights.

6. *Unfair Discrimination Against Policyholders Who Elect Reduced Paid-Up or Extended Term Insurance.*

The Reinsurance Agreement not only discriminates among policyholders and creditors who are similarly situated, but also fails to treat the policyholders who are differently situated in a manner consistent with their rights as defined by their contractual relationship with Empire. In Section VIII B 1(d), (A-45) it is provided that if a policy is placed on a reduced paid up or extended term insurance, the amount of such insurance is reduced by one-half (½) of the then existing moratorium. The same section further provides that the moratorium continues against the paid up insurance and is to be deducted from its cash surrender value. Accordingly, these policyholders are charged twice, once with the one-half (½) moratorium and next with 100% of the moratorium (S.F. 652, 808). These policyholders are clearly discriminated against and are treated in a manner which is clearly inconsistent with their rights as holders of policies placed on reduced paid up or extended term insurance. There is simply no evidence in the record justifying the double imposition of a moratorium upon these policy-

holders. Again, the Court of Civil Appeals failed to confront this discriminatory provision of the Reinsurance Agreement in its opinion holding that the Reinsurance Agreement does not unlawfully discriminate among Empire's policyholders.

7. *Unfair Discrimination in the Form of Preferential Treatment for Consenting Policyholders.*

Under the First Amendment to this Reinsurance Agreement, Paragraph 4, (p. A-71), it is provided that the Receiver shall assign to Protective death proceeds from insurance policies on the life of Moody in the amount of $4,350,000, subject to increase or decrease of that amount to match the admitted asset value of Protective's interest in the Libbie Shearn Moody Trust. (The $4,350,000 figure exceeds by $100,000 the admitted asset value and the Agreement contains no justification whatsoever for the excess.) In fact Dr. Olshen testified that it was an error (S.F. 500). The Receiver is to pay all premiums on the life insurance on Moody's life and Protective is to reimburse the Receiver annually for its pro rata part. However, if Protective, upon non-payment by the Receiver pays the premiums, Protective receives all of the policy benefits, or $12,000,000. Accordingly, Protective may receive all of the insurance proceeds on Moody's life (S.F. 203-5). Such proceeds could be sufficient to entirely eliminate the moratorium, in which event Protective, not the creditors and stockholders, will retain the excess under the terms of the Reinsurance Agreement. Upon the elimination of the moratorium by that windfall or by ordinary profits on the business (which Mr. Pennington projected would occur in ten years with a 35% moratorium S.F. 1415), the consenting policyholders whose policies are reinsured will thereafter receive

100% of their claims, but the non-consenting policyholders and all other creditors (who have at least $6,000,000 worth of claims) have only a claim for their pro rata part of the two million dollar fund, if any is left after paying expenses of administration. This is clearly preferential treatment of accepting policyholders over rejecting policyholders and Empire's creditors, and the ancillary receiver offered no proof to justify this preferential treatment.

8. *Unfair Discrimination Regarding the Payment of Dividends.*

With respect to the payments of dividends on Empire policies, the Reinsurance Agreement approved by the Trial Court unlawfully prefers certain policyholders in several ways. Most of the policies issued by Empire or reinsured by it were "participating" policies, i.e., the company paid dividends upon the policies to the policyholders. In the case of the American Trust policies, the dividend obligation was a contractual one under a Reinsurance Agreement between American Trust and Empire (Defendants' Exhibit 13). In other words, the amount of the dividend was not left to the discretion of the board of directors of the company, but had to be in a certain specified amount. However, in Section XII A of the Reinsurance Agreement (A-53), the dividend obligation of Empire to American Trust was not assumed. The Reinsurance Agreement provides in Section XII A 1 and 2 (A.54-5), that dividends on policies assumed by Protective shall thereafter be declared only at the sole discretion of Protective, except in the case of Presidents Special Investors Plan (PSIP) policies issued by Empire Life Insurance Company of America, Little Rock, Arkansas, and assumed by Empire which are different policyholder obligations under the Reinsurance Agreement. Clearly then, the Reinsurance Agreement unlawfully discriminates among policyholders who are similarly situated; i.e., policyholders who were entitled to dividends by virtue of their contractual relationship with Empire.

9. *Discrimination as to Amounts Left on Deposit*

Policyholders with matured endowments or coupons left on deposit, persons who have simply not yet collected money due them with Empire prior to the effective date of the Reinsurance Agreement, are charged the full amount of the moratorium as to these amounts, but persons whose endowments mature after the effective date, or whose coupons are left on deposit after the effective date are not so charged (Receiver's Exhibit 6). This obviously prefers certain policyholders over others (S. F. 813). However, no testimony was offered justifying this different treatment.

10. *Discrimination as to Policy Loan Applications*

Although the moratorium is stated to become effective as of the effective date of the Reinsurance Agreement and chargeable against withdrawable funds, including the policy loans, it is stated in Section VIII A-1 (A-43), that in determining moratorium amounts, policy loan requests after June 29, 1972 (a date about 2½ years prior to approval of the Reinsurance Agreement and about three years prior to its effective date which is included) shall be disregarded. This prefers policyholders who made their loan requests prior to that date and discriminates against those who requested loans after that date yet there was no testimony as to any justification for such discrimination, nor for the election of such date.

11. *The Tontine Aspect of the Reinsurance Agreement Unlawfully Discriminates Between Policyholders*

Tontine Insurance derives its name from its Italian inventor Tonti. The original concept was that premiums were invested for a number of persons and income was divided among all, but shares of members who died did not go to the insured's legal representatives but to the interest of the last surviving members until the last survivor took the whole income and principal. *1 Couch on Insurance 2d* §1:102, pp. 98-99 (1960). Tontine policies have been outlawed by every state in the nation. (See i.e. ALA. INS. DEPT. REG. #15).

In the present case Doctor Olshen, the Domiciliary Receiver's expert witness, testified that one of the elements of the Reinsurance Agreement was that the agreement has a semi-tontine effect (S.F. 308). Dr. Trosper, an expert who testified on behalf of the Defendants, explained how this tontine aspect worked (S.F. 802, 803, 804). The moratorium at the beginning is set at 35% (which was later increased to 50%). However, according to Protective's own projections, the profit to be produced by the business taken over by Protective is projected to be sufficient to reduce the moratorium every year until it is eliminated in ten years or sooner. The result of this reduction in the moratorium is that if an insured cashes in his policy in the first year, he receives only 65% of cash surrender value (This amount was changed by the Second Amendment to 50%). If a man cashes in his policy in the second year, the policyholder gets less of a moratorium applied and accordingly receives more cash than the man who cashes in the first year and so on for ensuing years. The same applies to loans on policies. The tontine aspect was put in to create an incentive for people to

continue to pay premiums on their policies (S.F. 433). However, in practice, as Dr. Trosper explained, the tontine aspect penalizes those policyholders who take the cash value or loan value of their policies or permit their policies to lapse in early years and discriminates against policyholders who do the same thing in later years (S.F. 802-804). The fact that the tontine aspect induces a continuation of policies is no justification for persons who have paid the same premiums for the same contracts with Empire. Petitioners submit that this tontine aspect is contrary to both Texas and Alabama law.

The Texas Insurance Code Article 21.21 Section 4 provides in pertinent part as follows:

> UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES DEFINED. — THE FOLLOWING ARE DEFINED AS UNFAIR METHODS OR COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES IN THE BUSINESS OF INSURANCE: . . .
> (7) UNFAIR DISCRIMINATION
>
> (a) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other terms and conditions of such contract . . .

Moreover, Article 21.21-A of the Texas Insurance Code provides in pertinent parts as follows:

> No insurance company doing business in this state shall make or permit any distinction or discrimination in favor of individuals between the insured of the same class and of equal expectation of life in the amount of the payment of premiums or rates charged

for policies of life or endowment insurance or dividends or other benefits payable thereon: . . .

The Alabama Insurance Code has a similar provision. Title 28A Section 237 of that Code provides as follows:

> LIFE INSURANCE, ANNUITIES AND DISABILITY INSURANCE: UNFAIR DISCRIMINATION.—
>
> (1) no person shall make or permit any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract. (2) No person shall make or permit any unfair discrimination between amount of premium, policy fees, or rates charged for any policy or contract of disability insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever. (1957, p. 866, §4, appvd. Sept. 18, 1957; 1971, No. 407, effective Jan. 1, 1972).

The above provisions prohibit discrimination in the payment of policy benefits. However, the tontine aspect of the Reinsurance Agreement approved by the Trial Court below does just this. Though policyholders are entirely of the same class and may have the same expectation of life, under the Reinsurance Agreement, policyholders who decide to cash in their policies or who lapse in the early years are penalized, and much more than policyholders who do not. Petitioners submit that this aspect of the Reinsurance Agreement is unfair discrimination, prohibited by both Alabama and Texas law, and accordingly that the Court of Appeal's affirmation of the trial court's order was erroneous. *Order of Railway Conductors of America v. Quigley*, 131 Tex. 4, 111 S.W. 2d 698 (1938);

See also, State Life Insurance Company v. Strong, 127 Mich. 346, 86 N.W. 825 (1901); *Robinson v. Wolfe*, 27 Ind. App. 683, 62 N.E 74 (1901); *Equitable Life Assurance Society v. Commonwealth*, 113 Ky. 126, 67 S.W. 388 (1902).

V.

THE COURT OF CIVIL APPEALS DENIED THE PETITIONERS THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT WHEN IT HELD THAT THE ANCILLARY RECEIVERSHIP COURT HAD JURISDICTION TO APPROVE THE REINSURANCE AGREEMENT EVEN THOUGH THE SUIT BELOW WAS INITIATED WITHOUT THE DIRECTION, AUTHORIZATION, OR APPROVAL OF THE TEXAS STATE BOARD OF INSURANCE AS REQUIRED BY SECTION THIRTEEN OF ARTICLE 21.28 OF THE TEXAS INSURANCE CODE.

On April 5, 1972, the Commissioner of Insurance of the State of Texas by Order No. 36707 found without a hearing that Empire should be placed under supervision in Texas under Article 21.28-A of the Texas Insurance Code. However, on June 7, 1972, by Commissioner's Order No. 37251 the Commissioner of Insurance did not appoint a conservator under Article 21.28-A, Empire having represented that it would interpose no delay concerning the receivership proceedings initiated against Empire in Alabama. The State Board of Insurance took no official action concerning Empire at all (S.F. 266-272).

Nevertheless, on June 23, 1972, the State of Texas by the Attorney General of Texas "at the instance and the request of

the *Commissioner of Insurance* of the State of Texas," filed its original petition in this case against Empire Life Insurance Company of America asking that after a hearing a permanent receiver be appointed to take the possession of the affairs of Empire pursuant to *Article 21.28* of the Texas Insurance Code and pursuant to Subsection (a) of Section 12 of Article 21.49-1 of the Texas Insurance Code. The petition further alleged that Empire, a company domiciled in Alabama had been placed in receivership in Alabama and Plaintiff asked that "the receivership prayed hereinfore should be made ancillary to such Alabama receivership *in accordance with Section 13 of Article 21.28 of the Texas Insurance Code.*" (Emphasis added)

Section 13 of Article 21.28 of the Texas Insurance Code provides as follows:

> *Sec. 13. Ancillary Delinquency Proceedings.* Whenever under the laws of this State, a receiver is to be appointed in delinquency proceedings for an insurer domiciliary in another state, a court of competent jurisdiction in this State shall, *on the petition of the Board of Insurance Commissioners of this State*, appoint the liquidator herein provided as ancillary receiver in this State of such insurer. *The Board* shall file such petition (a) *if it finds* that there are sufficient assets of such insurer located in this State to justify the appointment of an ancillary receiver, or (b) if ten (10) or more persons resident in this State, having claims against such insurer, file a petition or petitions in writing with the Board, requesting the appointment of such ancillary receiver. Such ancillary receiver shall have the right to sue for and reduce to possession the assets of such insurer in this State, and shall have the same powers and be subject to the same duties with respect to such assets, as are possessed by a receiver of a domiciliary insurer under the laws of this State. The remaining provisions of this Article shall be applicable to the conduct of such ancillary proceedings [Emphasis added].

Texas no longer has a Board of Insurance Commissioner's as referred to in Section 13, Article 21.28. However, under Article 1.02(b) of the Texas Insurance Code the State Board of Insurance in the State of Texas is the successor to all the powers, functions, authorities, prerogatives, duties, obligations and responsibilities previously vested in the Board of Insurance Commissioners. Article 1.02(b) and (c) of the Texas Insurance Code state as follows:

> (b) All of the powers, functions, authorities, prerogatives, duties, obligations and responsibilities, heretofore vested in devolving upon the Board of Insurance Commissioners as heretofore constituted under prior statutes; the Chairman of said Board; the Life Insurance Commissioner; the Fire Insurance Commissioner; and the Casualty Insurance Commissioner, shall hereafter be vested in the State Board of Insurance as a body, and except as provided herein, they shall be exercised, performed, carried out, and administered by the Commissioner of Insurance as the chief executive and administrative officer of the Board in accordance with the pertinent laws of this state and the rules and regulations for uniform application made by the Board and subject to supervision of the Board. The duties of the State Board of Insurance shall be primarily in a supervisory capacity and the carrying out and administering the details of the Insurance Code shall be primarily the duty and responsibility of the Commissioner of Insurance acting under the supervision of the Board.
>
> (c) Except as otherwise provided herein, all remaining references in the Insurance Code and other statutes of this state to "Board of Insurance Commissioners," "Board," or individual Commissioners shall

> mean the "State Board of Insurance" or the "Commissioner of Insurance," consistent with their respective duties and responsibilities under the terms and provisions of this amendatory Act.

These statutes are clear. It is the *State Board of Insurance* that must initiate ancillary receivership proceedings under Section 13 of Article 21.28, *not the Commissioner of Insurance.* In this case, however, it was the Commissioner of Insurance that initiated the ancillary receivership proceedings, not the State Board of Insurance. The Commissioner of Insurance is wholly without statutory authority to initiate such proceedings on his own. Yet, this is precisely what occurred.

The strange and unprecedented institution of this proceeding by the Attorney General of Texas was questioned by Judge Jones in the District Court below, but he failed and refused to direct that the proper statutory procedures be followed by the appropriate officials having the authority to place an insurance company in receivership. Accordingly, Empire was not treated the same as any other insurance company and was denied the equal protection of the laws guaranteed by the Fourteenth Amendment.

When discussing why the application for a mandatory temporary injunction was commenced on application of the Attorney General, Judge Jones entered into the following colloquy on April 5, 1973, with Assistant Attorney General Rash:

> *I know from press reports that this thing is fraught with politics.* I don't want it in this court, if there is a "mad" on politically about this, I don't want it to be a part of this proceeding, and that is why I mention it. I have had the receiver file in many, many receiverships, a petition not of this nature, as I recall—I do not recall any for mandatory temporary injunction—but to recover assets of the receivership estate, and *this is the first one that I recall that was brought by the attorney general's office.* I may be mistaken. It is the first one I recall.

MR. RASH: If Your Honor please, *that is absolutely correct.* We have a new statute which I think adds great basis for this very type of action. Now, Your Honor, I will say right now it would suit me fine if the Court told us not to try to recover assets. As Your Honor knows, we frequently have very aggravated types of misapplication of company funds. *Now, it would be perfectly all right if we don't have any authority, if the Court holds that we don't have any authority to come before the Court with an urgent situation such as we think we have here.*

> THE COURT: Mr. Rash, you misunderstood me. I said I welcome any help. *But I want to make it abundantly clear that I am looking to the receiver appointed by the Court as the one to protect the receivership estate and to recover its funds.* Any assistance elsewhere is welcome, *but I cannot pass up this the apparent coincidence that in this case this procedure is followed, and why it is not a petition on behalf of the receiver.*
>
> Now, this is complicated somewhat by the fact—and I don't deplore this at all; I think it works excellently—that the receiver is in effect a State employee, the liquidator . . . [Emphasis supplied] [Hearing April 5, 1973, T.pp. 469, 470.]

Note that even the Attorney General's office questioned whether that office had authority to institute this action herein. The Court, rather than holding that it did not, begged the question and said that it was looking to the receiver to protect the

receivership estate. But the receiver has no authority to act in an action brought without authority.

When the Commissioner of Insurance of Texas took it upon himself to request the Attorney General to initiate ancillary receivership proceedings against Empire under Section 13 of Article 13 of Article 21.28, he was acting completely in excess of his authority, ultra vires and such acts are void and have no force and effect. Further, Empire was deprived of the equal protection of the laws by being the only insurance company put into receivership on application of the Attorney General rather than by the duly authorized authority.

Since the action taken by the Insurance Commissioner on his own was completely without authority and is void, the Trial Court was without jurisdiction to even consider a Reinsurance Agreement for Empire, much less approve one.

Of course Petitioners do not contend that the Attorney General of the State of Texas could not by himself bring quo warranto proceedings to forfeit a domiciled company's charter in Texas. *See John L. Hammond Life Insurance Company v. State*, 299 S.W. 2d 163 (Tex. Civ. App.—Austin 1957, writ ref'd. n. r. e.). But the Attorney General on his own or at the instance of the Commissioner of Insurance has no authority under Texas statutes to ask for an ancillary receivership or the cancellation of a certificate of authority of a foreign insurance corporation in Texas. Under Article 21.28 the exclusive authority to initiate such proceedings is given to the State Board of Insurance, *not* the Attorney General, *not* the Commissioner of Insurance and *not* the Attorney General acting for the Commissioner of Insurance.

That the proceeding for the cancellation of the certificate of authority in Texas and the appointment of a receiver in Texas must be initiated by the State Board of Insurance, rather than the Commissioner of Insurance, has been recognized by the courts of Texas in the case of *Lumbermen's Insurance Corporation v. State*, 364 S.W. 2d 429 (Tex. Civ. App.—Austin 1963, writ ref. n.r.e.). Though that case dealt with the appointment of a receiver for a company domiciled in Texas under Section 2(a) of Article 21.28 of the Texas Insurance Code, the court recognized that under both that section and Section 13 the action must be initiated by the State Board of Insurance, not the Commissioner of Insurance:

> The Texas Insurance Code empowers the Court to appoint the statutory liquidator as receiver to take charge of the assets of the company and proceed with the company as the court may direct . . . . The action of the attorney general in behalf of the Board of Insurance was correct. . . .

The dangers of such circumvention of Section 13 of Article 21.28 by the Commissioner in initiating ancillary receivership proceedings become more apparent when viewed in the Commissioner's absence of authority to initiate actions against domestic insurance companies. Article 1.19 of the Texas Insurance Code mandates that only the State Board of Insurance has the power to initiate or maintain actions affecting the business of domestic insurance companies. Article 1.19 states that:

> The Board shall have the power to institute the suits and prosecution either by the Attorney General or such other attorneys as the Attorney General may designate for any violation of the law this state relating to insurance. No action shall be brought or maintained by any

person other than the Board by closing up the affairs or to enjoin, restrain or interfere with the prosecution company organized under the law of this State.

The absence of the ability of the Commissioner of the State of Texas to initiate such proceedings was confirmed in *Adler v. Brooks*, 375 S.W. 2d 544 (Tex. Civ. App.—Tyler 1964, ref n.r.e.). To permit the Commissioner to initiate the receivership proceedings under Section 13 of Article 21.28 while the Commissioner is not allowed to seek relief under Article 1.19 would totally contradict the statutes and clear legislative intent.

Though prior to the initiation of these proceedings Empire was placed in supervision by the Texas Commissioner of Insurance in an order of April 5, 1972, the proceedings below were not initiated under Article 21.28-A. The fact that the proceedings before the Texas Ancillary receivership court are not under Article 21.28-A is evidenced both by the fact that the Texas Attorney General's Petition alleges in at least two places that the proceedings are under Article 21.28 of the Texas Insurance Code, but also by the fact that the procedures followed below are not the procedures required in Article 21.28-A.

Under Article 21.28-A the Commissioner of Insurance is authorized to request the Attorney General to file a quo warranto suit only after (1) notice, (2) a hearing and (3) a finding by the Commissioner that the insurance company has failed to comply with the lawful requirements of the Commissioner. In this case this was never done. Instead, the Insurance Commissioner decided to wait for the Alabama court to act to appoint a receiver, and when that Court did act on June 22, the Commissioner of Insurance, not the State Board of Insurance, requested the Attorney General to file the present action.

Further, the holding of the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas in *Day v. State*, 489 S.W. 2d 368 (Tex. Civ. App.—Austin 1972, writ ref. n.r.e.) is not res judicata of the issues raised by the Petitioners. In *Day* the court's holding that the Commissioner of Insurance has the independent authority to seek the "receivership and liquidation" of an insurer was based upon Article 21.28-A of the Texas Insurance Code and not upon Article 21.28, Section 13, the section upon which the present Texas ancillary receivership proceeding is based. In addition, the Court's holding in *Day* that the Attorney General has the independent authority to initiate quo warranto proceedings to forfeit a corporation's charter and the authority cited by it in support thereof are not res judicata of the issue raised by the Petitioners, whether the Attorney General has the independent authority under Texas law to ask for an ancillary receivership of a foreign insurance corporation doing business in Texas. Under Article 21.28 the exclusive authority to initiate such proceedings is given to the State Board of Insurance *not* the Commissioner of Insurance and *not* the Attorney General acting for the Commissioner of Insurance.

In summary, since this proceeding was brought under Article 21.28 of the Texas Insurance Code and since Section 13 of Article 21.28 requires that the proceedings be brought upon the instance of the Texas State Board of Insurance, and not the Texas Commissioner of Insurance, the acts of the Texas Insurance Commissioner here are wholly without authority, and accordingly are void. The Court of Civil Appeals failure to so hold clearly denied the Petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment.

CONCLUSION

For the reasons stated, the Petitioners pray that their Petition for a Writ of Certiorari to the Court of Civil Appeals for Tenth Supreme Judicial District of Texas be granted.

Respectfully submitted,

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PROOF OF SERVICE

Proof of service of three copies of Petitioners' Petition for a Writ of Certiorari and Appendix upon each of the parties separately represented by counsel was filed by FRANK G. NEWMAN, a member of the Bar of the United States Supreme Court, with the Clerk of the United States Supreme Court on the same date the petitions were filed.

ADDENDUM

INTER-OFFICE COMMUNICATION

Attorney General's Office

DATE: April 19, 1974.

TO: File AG72-888

FROM: Ralph Rash

SUBJECT: Empire Life

On April 18, 1974, I received an emergency call from Tom McFarling, Deputy Commissioner of Insurance, formerly Liquidator of the State Board of Insurance, saying that a crucial and urgent matter had arisen in the Empire case. I rushed to the State Board of Insurance and had a conference with Tom, Herb Crook, the present Liquidator, Bob Clines, and others, and later in the day, we conferred with the Commissioner and the Board.

Herb Crook had just returned from Alabama where, he stated, the Judge of the State court (Judge Barber) had announced his inclination to appoint "an administrator" for Empire Life for the sole purpose of rehabilitating the company, who would take possession of all of the assets of the company, including those in Texas, and administer the company from Alabama.

This alarmed everyone. In order for you to understand the significance of this matter, I will give you a brief history of the case.

In the early part of 1972, as the result of the investigation by our office of another matter, we learned that the recently filed

examination report of Empire Life revealed that the company was insolvent by approximately $14 Million Dollars. It further developed that the company had not been examined for five years, even though the law requires that insurance companies be examined at least every three years. The company technically had its domicile in Alabama, which had provided a very favorable climate in previous years for the operation of crooked insurance companies. Commissioner Cotten was agreeable to the filing of a suit in Texas to place the company in receivership, but he wanted to wait until Alabama appointed a receiver, so that we could appoint an ancillary receiver. Getting the Alabama court to proceed with the appointment of a receiver was like mining granite, and it took until about June 22, 1972, for Judge Barber to finally act.

In the meantime, it became apparent that the de facto domicile of Empire was in Dallas, where they maintain their principal offices and every operation of the company was headquartered there. Most of the policyholders and most of the assets were in Texas and very little business of the company was conducted in Alabama. Several states had a considerable number of policyholders. About a month prior to the action of the Alabama court, the company was placed in receivership by the Arkansas court, where the company has considerable business, but we could not persuade Clay Cotten to go ahead with a receivership in this state. We felt that to permit the Alabama authorities to have charge of the affairs of the company would be like permitting the "tail to wag the dog", and we knew that in this case the "tail" was very corrupt. Let me hasten to add that Commissioner Bookout of Alabama impressed all of us as being a fine and honest man, and none of us have had occasion to doubt his

integrity at any time. However, he had considerable reservations about Judge Barber.

At the hearing conducted before Judge Barber last week, the Commissioners of Alabama, Texas, Arkansas and all of the other states in which the company did business were trying to convince the court that he should approve a plan for the reinsurance of the company's business, which they had unanimously worked out. Herb Crook reported that the lawyer for Commissioner Bookout put on a "beautiful" case and, without a word of evidence to support the action, the court called a conference in chambers where he announced his idea of appointing a crony of his, Paul Carr, to take over the company as its "administrator". This is foreign to law, and is in the very teeth of the statutory and case law on the matter. Commissioner Bookout plans to appeal from such an order, if it is entered. Judge Barber told the parties to return for further proceedings next Monday, and it is anticipated that he will announce his decision at that time.

The emergency arises by reason of the fact that if Judge Barber dissolves the domiciliary receivership, it might have the effect of terminating or at least impairing our ancillary receivership, and I revived my original theory of the case that Texas should have filed the case here on the ground that the de facto domicile of the company was in Texas. However, I stated that I thought it was probably too late and that we would not be in a strong position to urge such theory.

As our conference progressed, it became more and more apparent that the others present, especially Herb Crook, took great stock in the idea of reviving the de facto domicile theory,

and all of us commenced a search of our prior briefs on the subject. I found mine and relayed them to Herb Crook.

My tentative conclusion is that under the authorities which I included in a brief which I submitted to Tom McFarling several months ago, the Texas statutes and cases simply do not permit any one to remove the assets of this corporation from the state until the Texas creditors and policyholders have been satisfied. Therefore, at this point, I do not feel that it is necessary to amend our pleadings so as to ask Judge Jones to convert the ancillary receivership into a domiciliary receivership, *but* this may become necessary. I do not think we would be jeopardizing our position by waiting to see what Judge Barber does, because any order of the Alabama court attempting to remove the statutory receiver would be appealed from and would not be final for quite some time, and we would have ample time to reconsider our basic pleadings in the matter. In other words, the Alabama court could not possibly enforce its orders within the State of Texas, and if he does not back down from his ridiculous notion of appointing an "administrator", we can deal with the problem before his order becomes final.

Herb Crook, as the court's receiver, contacted Judge Jones and apprised him of the situation in Alabama, but Judge Jones did not have any proposal as to what should be done at this time.

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-873

SHEARN MOODY, JR., and
JOHN S. BLEKER,
Petitioners,

VS.

THE STATE OF TEXAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT OF TEXAS

INDEX

A-1

Shearn MOODY, Jr., et al., Appellants,

v.

STATE of Texas, Appellee.

No. 5505.

Court of Civil Appeals of Texas,

Waco.

May 13, 1976.

HALL, Justice.

The substantive issue on this appeal is whether the trial court erred after a non-jury hearing in authorizing the ancillary receiver (in Texas) of Empire Life Insurance Company of America to cooperate in the consummation of a reinsurance contract between Empire's principal receiver (in Alabama) and Protective Life Insurance Company, an Alabama Corporation. We affirm the order.

There has been much related litigation in the courts of Texas and Alabama. Some is reported in *Day v. State*, 489 S.W.2d 368 (Tex.Civ.App.—Austin, 1973, writ ref., n. r. e.); *Empire Life Insurance Company of America v. State*, 492 S.W.2d 366 (Tex.Civ.App.—Austin, 1973, no writ hist.); *Moody v. Jones*, 519 S.W.2d 536 (Tex.Civ.App.—Austin, 1975, no writ hist.); *Moody v. State*, 520 S.W.2d 452 (Tex.Civ.App.—Austin, 1975, no writ hist.); *Moody v. Crook*, 520 S.W.2d 958 (Tex.Civ.App.—Austin, 1975, no writ hist.); and *Moody v. Moody National Bank of Galveston*, 522 S.W.2d 710 (Tex.Civ.App.—Hou. 14th. 1975, writ ref., n. r. e).

Empire Life Insurance Company of America (hereinafter "Empire") is an Alabama corporation. Because of mergers with Texas companies, at least one-half of its policyholders are Texas residents. In June, 1972, Empire was found by the courts of Alabama to be insolvent, and was placed in receivership. Immediately thereafter, an ancillary receiver was appointed by the courts of Texas. Substantially all of Empire's physical assets are located in Texas. A major asset is an interest in the Libbie Shearn Moody Trust, which is administered by the Moody National Bank of Galveston, Texas. This interest was assigned to Empire by Shearn Moody, Jr. ("Moody"), an appellant here, who is the beneficiary of a lifetime income under the Trust. The other appellant, John Shearn Bleker, is Moody's cousin. He owns 300 shares of Empire stock and holds a $5,000 paid-up Empire life insurance policy. Protective Life Insurance Company is an old-line, conservative company with over $25,000,000 in capital and surplus, and with an excellent reputation. Its home office is in Birmingham.

As a result of Empire's insolvency, and after unsuccessful attempts to "rehabilitate" Empire, the States of Alabama, Texas, Arkansas, Montana, Nebraska, and Oklahoma suspended Empire's operations there and proceeded with plans for reinsuring the outstanding Empire insurance policies. On June 14, 1974, the reinsurance plan in question was approved by the Circuit Court for the Tenth Judicial District of Alabama, upon the application of the domiciliary receiver. On February 26, 1975, the order challenged on this appeal was rendered authorizing the Texas ancillary receiver to consummate the reinsurance agreement.

The appellants assert a number of reasons why they say the

agreement establishes unlawful discriminatory preferences among Empire's policyholders and creditors. We overrule these contentions.

The agreement is lengthy. The testimony relating to fairness *vel non* is voluminous. We need not detail either. The appellants' argument is erroneously based upon the premise that all Empire policies are alike and must therefore be treated identically in the reinsurance contract. The record shows that the policyholders come from many different companies with many different plans and policies, and it supports the determination that treating the different policyholders identically in the reinsurance plan and ignoring the various policy distinctions would result in unfair discrimination. Rather, the agreement identifies each unusual or unique group and treats it with special provisions formulated to produce equitable benefits for all. It is axiomatic that a different classification and treatment of persons based on real and substantial differences between them is not per se unlawful discrimination. See 12 Tex. Jur.2d 458, Constitutional Law, § 111. Such different treatment is often necessary, as it is here, to *avoid* unlawful discrimination.

The contract in question provides in meticulous detail how the disparate groups of Empire's policyholders shall be treated. The proof shows it to be much more detailed and carefully thought out than any other reinsurance bid received by the receiver. It guarantees the payment of all death benefits under all of the policies. However, the record shows that Empire's assets are worth millions of dollars less than the reserve liabilities of the policies Protective assumes under the plan; that Empire is in fact impaired in excess of $10 million and is insolvent in excess of $6 imllion. To off-set this multi-million dollar

gap the reinsurance agreement places a ten-year limitation called a "moratorium" of 35% on all cash benefits that can be exercised voluntarily by the policyholders. In other words, the moratorium reduces the reserves by limiting the amount of cash the policyholders may voluntarily withdraw under the terms of their policies. However, full policy benefits by the time of ending the moratorium are guaranteed by Protective to all accepting policyholders. Under the reinsurance contract, Protective receives no profits until the moratorium has been completely eliminated.

Obviously, policyholders who accept reinsurance and the eventual restoration of all policy benefits which come with it are treated differently from those who reject. But every policyholder has this choice and makes it voluntarily. At any given point in time all policyholders are treated precisely the same in relation to the moratorium. Different treatment as a result of a voluntary election can hardly be classified as arbitrary or unfair discrimination. In any event, the plan provides that Protective will transfer to the receiver assets equal in value to the reserve liability for every policy of every rejecting policyholder less the moratorium amount on each such policy. The Receiver can then pay this amount to the rejecting policyholder. This payment approximates the initial value of the agreement to policyholders who accept reinsurance, and thus produces equal treatment of accepting and rejecting policyholders as closely as it can be done.

In addition to the terms we have cited for payment of claims of rejecting policyholders, the agreement provides for the receiver to retain an additional $2 million for payment of the

claims of other creditors which have not been assumed by Protective. Under the testimony, this fund is sufficient to treat all such claims equitably. There is no discrimination.

The appellants claim a violation of constitutional due process because the policyholders were not given notice of the hearing below. The appellants had notice of the hearing and participated in it. Accordingly, they have not suffered from the alleged unconstitutional act they assert, but are simply assuming to champion an alleged wrong of others. The general rule in constitutional litigation, applicable here, is that one may not assert the rights of third parties. *Corey v. City of Dallas*, 492 F.2d 496, 497 (5th Cir. 1974). The appellants have no standing to raise the point in question. *Armenta v. Nussbaum*, 519 S.W.2d 673, 679 (Tex.Civ.App.—Corpus Christi, 1975, writ ref'd, n. r. e.).

Moody made a written demand and fee deposit for a jury. He contends the order in question must be set aside because he was not accorded a jury trial. We disagree. The problem facing the court below was one of proper management and control of the assets of a receivership. It turned specifically on whether the proposed reinsurance agreement recommended by the Texas Receiver, an officer of the court appointed by the court, would serve the best interests of the Empire policyholders. Property held by a receiver is in *custodia legis*. It is the settled rule that questions concerning the management and control of such property are addressed to the sound discretion of the court without the interposition of a jury. *McHenry v. Bankers' Trust Co.*, 206 S.W. 560, 572 (Tex.Civ.App.—Galveston, 1918, writ ref.); *Ferguson vs. Ferguson*, 210 S.W.2d 268, 269 (Tex.Civ.

App.—Austin, 1948, writ ref., n. r. e.), certiorari denied, 337 U.S. 943, 69 S.Ct. 1498, 93 L.Ed. 1747 (1949), rehearing denied, 338 U.S. 853, 70 S.Ct. 81, 94 L.Ed 523 (1949), rehearing denied 339 US. 916, 70 S.Ct. 559, 94 L.Ed. 1341 (1950).

The record does not show an abuse of discretion. The appellants' points and contentions are overruled. The judgment is affirmed.

JUDGMENT RENDERED IN THE COURT OF CIVIL APPEALS, TENTH SUPREME JUDICIAL DISTRICT OF TEXAS, AT WACO, ON MAY 13, 1976:

Came on to be heard on the transcript of the record Cause No. 5505, entitled Shearn Moody, Jr., et al, appellants, vs. State of Texas, appellce, from 53rd District Court of Travis County; and the same being considered, it is the opinion of the Court there is no error in the judgment, it is adjudged and ordered that the judgment of the trial court is AFFIRMED. It is further ordered that the appellants, Shearn Moody, Jr., and John S. Bleker, Jr., as principals and Fidelity and Deposit Company of Maryland, as surety, pay all costs in this behalf expended and this decision be certified below for observance. Opinion by Justice Vic Hall.

COURT OF CIVIL APPEALS
Tenth Supreme Judicial District
P. O. Box 1606
Waco, Texas 76703

June 10, 1976

Frank G. McDonald
Chief Justice
Vic Hall
Associate Justice
John A. James, Jr.
Associate Justice

R. I. Gage, Clerk
Pearl Reuwer, Deputy Clerk
Telephone No. 753-7341
Area 817

Newman, Shook & Newman
4330 Republic National Bank Tower
Dallas, Texas 75201

Honorable A. R. Schwartz
U. S. National Bank Bldg.
Galveston, Texas 77550

Honorable Joseph P. Webber
Honorable Joe R. Long (Long and Evatt)
P. O. Box 222
Austin. Texas 78767

Re: Cause No. 5505 — Shearn Moody, Jr., et al., v.
State of Texas (Travis County)

Gentlemen:

You are notified that Appellants' Motion for Rehearing in the above cause was *OVERRULED* on June 10. 1976, in the

Court of Civil Appeals for the 10th Supreme Judicial District of Texas, at Waco.

Yours truly,
R. I. GAGE, Clerk

By: _____
Pearl Reuwer, Deputy Clerk

cc: Honorable John L. Hill
Honorable James R. Irion, III
Hon. Shannon H. Ratliff
Hon. Drayton Nabors, Jr.

COURT OF CIVIL APPEALS
TENTH SUPREME JUDICIAL DISTRICT
WACO, TEXAS

ORDER
JUNE 10,1976

Motion No. 9018, Cause No. 5505 Shearn Moody, Jr., et al, appellants, vs. State of Texas, appellee, from Travis County; Appellants' Motion for Rehearing OVERRULED.

IN THE SUPREME COURT OF TEXAS

No. B-6170 June 22, 1977

SHEARN MOODY, JR. ET AL.
VS.
THE STATE OF TEXAS
} Tenth District. From Travis County,

Application of petitioners for writ of error to the Court of Civil Appeals for the Tenth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused. (Justice Yarbrough not sitting)

It is further ordered that applicants, Shearn Moody, Jr. et al., and John S. Bleker, Jr., as principals, and Fidelity and Deposit Company of Maryland, as surety, pay all costs incurred on this application.

IN THE SUPREME COURT OF TEXAS

No. B-6170 July 20, 1977

SHEARN MOODY, JR. ET AL.
VS.
THE STATE OF TEXAS

From Travis County, Tenth District.

Petitioners' motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled. (Justice Yarbrough not sitting)

NO. 198,374

STATE OF TEXAS

VS.

EMPIRE LIFE INSURANCE COMPANY OF AMERICA, ET AL

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 53rd JUDICIAL DISTRICT

OPPOSITION TO PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT

COMES NOW, Defendant Shearn Moody, Jr., and files this his Opposition to the Motions for Summary Judgment filed by the Attorney General and the Ancillary Receiver on certain issues in the above entitled and numbered case, and as grounds therefor would respectfully show the Court as follows:

I.

The Plaintiff in the above entitled and numbered cause, through the Attorney General and the Ancillary Receiver, has moved for Summary Judgment on the issue of whether this Court should approve the June 14, 1974 Order of the Circuit Court for the 10th Judicial District of Alabama in Equity, the Domiciliary Receivership Court in the receivership proceedings regarding Empire Life Insurance Company of America, which Order found that Empire is insolvent and incapable of rehabilitation, and gives authority to consummate a reinsurance agreement entered into between Empire and Protective Life Insurance Company. The Plaintiff has also moved for

Summary Judgment on the issue of whether the Court should make the temporary injunction entered into by this Court against Empire and the other parties permanent, and has moved for Summary Judgment on the issues of whether this Court should make the appointment of Herbert Crook as temporary Ancillary Receiver, permanent. However, as explained more fully herein, genuine issues of material fact presently exist in the above case on each of these issues. Moreover, Plaintiff is not entitled to Summary Judgment on these issues, as a matter of law. Accordingly, as discussed more fully herein, it would be improper and erroneous for this Court to grant Plaintiff's Motions for Summary Judgment on any of these issues.

II.

ISSUES OF FACT

1. *Alabama Court Order Not Final.*

In 1972, in the Circuit Court for the 10th Judicial District of Alabama in Equity, Domiciliary Receivership proceedings were initiated against Empire Life Insurance Company of America. Defendant herein, Shearn Moody, Jr., is a stockholder in Empire Life Insurance Company of America and as such is an Intervenor in the above receivership proceedings. The present cause is the ancillary receivership proceeding, ancillary to the domiciliary receivership proceedings in the Alabama Court. On June 14, 1974 an Order was entered in the domiciliary receivership proceedings in Alabama, finding that Empire Life Insurance Company of America could not be rehabilitated and finding that it was in the best interest of

Empire policyholders to enter into a reinsurance agreement with Protective Life Insurance Company.

However, contrary to the assertion of the Plaintiff in this present case, the Order entered by said Court is not final. On October 14, 1974, Intervenor Moody filed his Motion pursuant to Rule 60(b) of the Rules of Civil Procedure of the State of Alabama for relief from the Order of June 14, 1974. A copy of said Motion is attached to Moody's Affidavit, which is attached hereto as Exhibit "A". According to Alabama law, said Order of June 14, 1974 is not final until Intervenor Moody's Motion under Rule 60(b) has been ruled upon. Such ruling has not yet occurred.

In the above-mentioned Motion by Intervenor Moody in the domiciliary receivership proceedings in Alabama, it is urged as follows:

1. That a recent post-judgment appraisal of the life estate of Shearn Moody, Jr. in the Libbie Shearn Moody Trust indicates that the Court erred in determining that Empire Life Insurance Company is insolvent

2. That the reinsurance agreement between Empire Life Insurance Company and Protective Life Insurance Company, as amended after the entry of the Order on June 14, 1974, shows that contrary to Alabama law, policyholders of Empire Life were being given preferential treatment over the creditors of Empire Life;

3. That during the course of the trial of the domiciliary receivership proceedings a witness in the proceedings, Mr. Herbert Crook, temporary Ancillary Receiver in the present case, presented a letter to the Court bearing upon the

issues before the Court *ex parte* without the knowledge of Moody or his counsel.

Contrary to assertions of Plaintiff, each of the matters asserted in Intervenor Moody's Rule 60(b) in the domiciliary receivership proceedings in Alabama presents genuine issues and material facts which are still pending before the Alabama Court. Accordingly, there are genuine issues of fact pending before the ancillary receiver proceedings in this present action concerning the authority of the Alabama Court to consummate the agreement between Empire and Protective Life Insurance Company, concerning the finality of the approval of said reinsurance agreement, concerning whether it is proper to make the Order granting temporary injunction in the present action permanent because of the present lack of finality in the receivership proceedings, and as to whether the temporary Ancillary Receiver in the present action, Herbert Crook, should be appointed permanent Ancillary Receiver, in light of the assertions and Intervenor Moody's Rule 60(b) Motion in the Alabama case.

2. *Questions of Insolvency and What is in the Best Interest of Texas Policyholders and Creditors are Still Before the Court.*

The Plaintiff is asking this Court to summarily approve the transfer of substantially all of the assets of Empire Life Insurance Company of America to Protective Life Insurance Company of Birmingham, Alabama. However, there has been no factual determination by this Court that Empire is even insolvent, and there has certainly been no determination by this Court as to what arrangement would be in the best interest of Texas policyholders and creditors. Both of these determinations involve issues of fact.

Since most of the assets of Empire are located in Texas, this Court has a special obligation to Texas policyholders and Texas creditors to insure that whatever arrangements made are in the best interest of those policyholders and creditors. However, under the Order of the Alabama Court, all of the assets of Empire, though primarily located in Texas, will be lumped together and treated as one, without any provisions for the protection of Texas policyholders and other creditors in relation to those assets. Moreover, under said Order this would be done without a full hearing by this Court that Empire is insolvent.

Under Article 21.28 Section 14 of the Texas Insurance Code, an Ancillary Receiver may enter into contracts or arrangements with Domiciliary Receivers in other states concerning the administration of the affairs of the receiverships only "under supervision of the Texas receivership Court". Approval of the Alabama Court's finding that the reinsurance agreement with Protective Life Insurance Company is in the best interest of Empire policyholders, including Texas policyholders, without any factual determination that Empire is insolvent and incapable of rehabilitation, and without any factual determination that the reinsurance agreement with Protective Life Insurance Company is in the best interest of all policyholders and creditors would be to approve the actions of the Ancillary Receiver and the Domiciliary Receiver without any supervision whatsoever, and would be directly contrary to Texas law.

Moreover, the solvency of Empire Life depends primarily upon the current evaluation of a two-fifths of a one-eighth life estate interest in the Libbie Shearn Moody Trust held by Empire. Defendant herein would show this Court that said

interest has value sufficient to make Empire a solvent corporation, and certainly not incapable of rehabilitation. Thus under Texas law, questions of material fact exist concerning the solvency of Empire Life Insurance Company and its ability to be rehabilitated and to question as to whether the proposed reinsurance agreement with Protective Life Insurance Company is in the best interest of all the policyholders and creditors, including Texas policyholders and creditors, and because of these issues of fact granting Plaintiff's Motions for Summary Judgment on certain applications would be completely improper.

III.

AS A MATTER OF LAW, PLAINTIFF NOT ENTITLED TO SUMMARY JUDGMENT

1. Ancillary Receiver not even a Party to Reinsurance Agreement.

As a matter of law, Plaintiff is not entitled to Summary Judgment on the application before this Court. Under Section 13 of Article 21.28 of the Texas Insurance Code the Ancillary Receiver has such rights and obligations with respect to assets located in this State as are possessed by a receiver of Domiciliary Insurer under the laws of this State. Under Section 2(b) of Article 21.28 of the Texas Insurance Code, title to the assets of Empire Life located in Texas is in this Texas Court or is in the custody of the receiver as soon as an Order directing the receiver take possession is entered. Thus, title to the assets of Empire Life located in Texas is in this Texas Court or in the Texas Ancillary Receiver. However, the Texas receiver is asking for approval by this Court of a contract which

disposes of Texas assets to which this Court, or the Ancillary Receiver, is not even a party. Such approval would be unlawful and directly contrary to Texas law.

Under the Texas Insurance Code, either the Court or the Ancillary Receiver must be a party to the contract disposing the Texas assets, or under Section 14 of Article 21.28, the Texas receiver must have entered into a contract with the Domiciliary Receiver concerning the administration of the affairs of the respective receiverships, subject to the approval of the Court. In present case, neither event has happened. Thus, since neither the Court nor the Ancillary Receiver is a party to the ancillary receivership agreement which approval is requested, nor has the Ancillary Receiver made a contract concerning the Texas assets with the Domiciliary Receiver in Alabama, as a matter of law Plaintiff is not entitled to Summary Judgment on the issues before this Court.

2. Summary Judgment Not Timely.

It would further be contrary to Texas law to grant Plaintiff's Motion for Summary Judgment on the issues before the Court because in the Texas ancillary receivership proceedings, no time has yet been set for the filing of claims against the insurer. Under Section 3(a) of Article 21.28 of the Texas Insurance Code, filing of such claims shall be within the period of time as "specified by the Court." However, the Court at this time has not specified any time for the filing of such claims. The time for filing of such claims, as a matter of due process, must be prior to any determination concerning the disposition of assets by reinsurance of Empire. This is the only manner in which Texas policyholders or creditors

are given notice of the proposed disposition of assets and reinsurance agreement, and the only manner in which they may be heard on such issues and object to such proposal if they so desire. Without such notice to Texas policyholders and other creditors, Texas policyholders and creditors would be constitutionally denied due process.

The 14th Amendment of the United States Constitution requires that policyholders and creditors be given prior notice and hearing before assets in which they have an interest are sold.

This is especially true in light of the following:

1. Under the terms of the said reinsurance agreement Protective Life Insurance Company of America does not assume all the liabilities of Empire Life Insurance Company of America to its policyholders, but only a portion thereof. The reinsurance agreement provides for the transfer to Protective Life Insurance Company of America, except $2,000,000. Accordingly, a policyholder who does not consent to reinsurance upon the terms stated in the reinsurance agreement would be left with nothing more than an unsecured claim against Empire Life Insurance Company of America, to share with other creditors in its assets after payment of all of administration expenses.

2. All the Empire Life Insurance Company of America assets are to be lumped together and transferred outside of Texas.

3. Under the present reinsurance agreement, Empire Life Insurance Company of America assets are to be transferred to Protective Life Insurance Company when the June 14,

1974 Order is final, regardless of the fact that problems may arise later with the Order or the Agreement.

Because no such notice has been given to the policyholders and other creditors as a matter of statutory and constitutional law, Plaintiff's are not entitled to summary judgment on the application before this Court.

3. The Alabama Court Order is an [sic] *Appeal.*

The Order of the Court for the 10th Judicial Circuit of Alabama in Equity of June 14, 1974, has been appealed by the Intervenor Moody in that action and said appeal is presently pending. It has also been appealed by two creditors of Empire, G. L. Myer and W. B. Sanford. The grounds of said appeal involve questions both of fact and of law. One issue of fact involved in that appeal is the question of the evaluation of the Moody Trust interest, an issue identical to an issue of fact before this Court. Defendant Moody submits that Summary Judgment here is improper until those issues of fact have been finally resolved in the Alabama proceedings on appeal. Defendant Moody further submits that a ruling on Plaintiff's Motion for Summary Judgment would be improper at this time because of said appeal in that if the Order of June 14, 1974 of the Alabama Court is reversed, the parties to the present litigation would have spend needless time and expense in seeking relief from any Summary Judgment granted in this Court, and a great waste of judicial energy would be the direct result of such summary action.

The appeal further asserts that the June 14, 1974 Order is erroneous as a matter of law. The order gives the Domiciliary Receiver authority to consummate the Empire Life Insurance

Company and Protective Life Insurance Company reinsurance agreement even though, contrary to Alabama law, such agreement prefers policyholders over creditors. Contrary to Alabama law, the agreement also prefers Protective Life Insurance Company as a creditor. See *Melco System v. Receiver of Trans American, Inc. 105 S.W.2d. 43 (1958)*.

In addition. said reinsurance agreement prefers certain policyholders over others, contrary to both Texas and Alabama law.

Under the terms of the reinsurance agreement dated September 25, 1968, between Empire Life Insurance Company of America and American Trust Life Insurance Company, all of the insurance policies and assets and liabilities of American Trust Life Insurance Company are to be treated as a separate entity for accounting purposes and Empire Life Insurance Company of America is to account to each such policyholder of American Trust Life Insurance Company who holds certain policies as described therein for his proportionate share of one-third of the earned surplus of such separate entity.

However, under the terms of the reinsurance agreement between Empire Life Insurance Company of America and Protective Life Insurance Company, there is no provision for segregating the policies, assets and liabilities acquired by Empire Life Insurance Company of America from American Trust Life Insurance Company or the payment to the policyholders of American Trust Life Insurance Company of their proportionate share of the said earned surplus.

IV.

In support of this Defendant's Opposition to Plaintiff's

Motions for Summary Judgment, the Affidavit of Shearn Moody, Jr. is attached as Exhibit "A" and said Affidavit is incorporated by reference herein.

WHEREFORE, Defendant Moody respectively moves this Court to deny Plaintiff's Motions for Summary Judgment because, for the above-stated reasons, genuine issues of material facts are presently pending in this case and because Plaintiff is not entitled to Summary Judgment as a matter of law.

Respectfully submitted,

LAW OFFICES OF FRANK G. NEWMAN
4330 Republic National Bank Tower
Dallas, Texas 75201

By: _____
FRANK G. NEWMAN

and

_____
LAWRENCE G. NEWMAN

A. R. SCHWARTZ
U. S. National Bank Bldg.
Suite 1020
Galveston, Texas 77550

By: _____
A. R. SCHWARTZ

EXHIBIT "A"

AFFIDAVIT OF SHEARN MOODY, JR. IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

STATE OF TEXAS }
COUNTY OF DALLAS }

BEFORE ME, the undersigned Notary Public, on this 6th day of November, 1974, personally appeared SHEARN MOODY, JR., who on oath did depose and say the following:

My name is Shearn Moody, Jr. I am currently residing at 8 Mill Road, Galveston, Texas. I am of lawful age and am competent to testify in all matters stated herein, and have personal knowledge of all matters stated herein.

I am currently, and have been since 1963, a stockholder in Empire Life Insurance Company of America.

In 1972, as a stockholder in Empire Life Insurance Company of America, I intervened and am presently a party in the case of the *State of Alabama, ex rel., John G. Bookout, Commissioner of Insurance, Plaintiff v. Empire Life Insurance of America, an Alabama corporation, Defendant* in the Circuit Court for the 10th Judicial District of Alabama in Equity, Case No. 171687.

On October 14, 1974, as Intervenor in that case, I caused to be filed a Motion under Alabama Rule 60(b) requesting relief from the Order entered by said Court on June 14, 1974. A copy of said Motion is attached hereto as Exhibit "A" and is incorporated by reference herein. I have personal knowledge

as to all the matters stated in said Motion and to the best of my knowledge and belief, all said matters are true and correct.

In the Alabama proceeding I expect to prove that Empire Life Insurance Company of America is solvent and that the proposed reinsurance agreement between it and Protective Life Insurance Company is contrary to Alabama law, because it gives preferential treatment to certain creditors of Empire Life Insurance Company of America.

The Order entered in the Alabama Court on June 14, 1974 is not final, at least until after the Rule 60(b) Motion, filed by myself, has been ruled upon. Said Motion has not yet been ruled upon.

In addition as a party to the Alabama case, I appealed the Judgment and Decree of the Alabama Court of June 14, 1974. Said appeal was based on errors both of fact and law made by the trial court.

SHEARN MOODY, JR.

SWORN TO AND SUBSCRIBED before me by Shearn Moody, Jr. to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged that he executed the same.

Margaret Day

Notary Public in and for
Dallas County, Texas

My Commission Expires:
June, 1975

STATE OF ALABAMA,
EX REL,
JOHN G. BOOKOUT,
COMMISSIONER OF
INSURANCE

PLAINTIFF

VS.

EMPIRE LIFE INSURANCE
COMPANY OF AMERICA,
an Alabama Corporation,

DEFENDANT

SHEARN MOODY, JR.

INTERVENOR

IN THE CIRCUIT COURT
FOR THE TENTH
JUDICIAL CIRCUIT
OF ALABAMA
(IN EQUITY)

CASE NO. 171-687

RULE 60(b) MOTION

Comes now the Intervenor, Shearn Moody, Jr., pursuant to the provisions of Rule 60(b) of the Alabama Rules of Civil Procedure, and respectfully requests relief from the judgment and decree herein of June 14, 1974, on the following grounds:

1. That during the course of the trial of this case, in April of 1974, Herbert Crook, a witness and the Ancillary Receiver of Empire Life Insurance for the State of Texas, presented a letter to the Court directly bearing on the primary issues before the Court. Such letter was delivered to the Court *ex parte* without the knowledge of Intervenor, Shearn Moody, Jr., or his counsel. A copy of such letter is attached hereto as Exhibit "A."

2. That a recent, post-judgment appraisal of the value of the life estate of Shearn Moody, Jr. in the Libbie-Shearn Moody

Trust, prepared by Harold Crandal, FSA, indicates that the Court erred in determining that Empire Life Insurance Company is impaired and insolvent. A copy of said appraisal is attached hereto as Exhibit "B."

3. That the Reinsurance Agreement, in toto, as amended following the entry of judgment on June 14, 1974, shows that the policyholders of Empire Life Insurance Company are being given preferential treatment over the other creditors of Empire Life Insurance Company contrary to the laws of the State of Alabama.

PREMISES CONSIDERED, Intervenor respectfully requests the Court to set aside its decree of June 14, 1974, grant a new hearing, and grant whatever further relief may be just and proper.

SIROTE, PERMUTT, FRIEND & FRIEDMAN, P.A.

BY: James A. Hamm Jr.
Attorneys for Intervenor
2030 First Federal Building
Birmingham, Alabama 35203

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the within and foregoing Rule 60(b) Motion upon all counsel of record by mailing a copy of same to each, United States mail, postage prepaid and properly addressed, on this 14th day of October, 1974.

_____

James A. Harris, Jr.

The foregoing motion is set for hearing before the Hon. William C. Barber at 10:00 o'clock A.M. on the 15 day of November, 1974.

_____

James A. Harris, Jr.

STATE BOARD OF INSURANCE
1110 San Jacinto
Austin, Texas 78786

April 19, 1974

The Honorable William C. Barber, Circuit Judge
10th Judicial Circuit of Alabama in Equity
Birmingham, Alabama

Dear Sir:

"Some question has been raised, as we understand it, concerning the authority of the Commissioner of Insurance of Texas to make certain recommendations regarding the future of Empire Life Insurance Company of America, an Alabama company licensed to do the business of life, health and accident insurance in the State of Texas.

The State Board of Insurance is the insurance regulatory body in the State of Texas provided by the Insurance Code of this State. Article 1.02 of said Code provides that insurance regulatory duties are "vested in the State Board of Insurance as a body, . . . (except as to certain exceptions not pertinent here) and they shall be exercised, performed, carried out and administered by the Commissioner of Insurance as Chief Executive Administrative Officer of the Board . . . ."

The Insurance Code also provides in Article 3.55-1, Section 3, as follows:

> "The Commissioner of Insurance is authorized to enter into arrangements or agreements with the insurance regulatory authorities of other jurisdictions concerning the management, volume of business, type of risks

to be insured, expenses of operation, plans for reinsurance, rehabilitation or reorganization, and method of operations of an insurance company that is licensed in such other jurisdictions and that is deemed to be in a hazardous financial condition or needful or specific remedies which may be imposed by the Commissioner of Insurance and insurance regulatory authorities of such other jurisdictions."

It is the position of the State Board of Insurance that the Commissioner of Insurance, in connection with the recommendations concerning Empire Life Insurance Company of America which have been presented to you, had discretionary authority and exercised that authority within the limits provided to him and that the Board does not have concurrent jurisdiction with him over the matter.

Sincerely,

STATE BOARD OF INSURANCE

JOE CHRISTIE, Chairman

NED PRICE, Member

DURWOOD MANFORD, Member

Receiver's Exhibit 6

TREATY OF ASSUMPTION AND BULK REINSURANCE

This Agreement is made and entered into in Birmingham, Alabama, as of this 31st day of May, 1974, effective as stated hereinbelow, by and between JOHN G. BOOKOUT, Commissioner of Insurance, State of Alabama (herein the "Receiver") in his capacity as Receiver of Empire Life Insurance Company of America, an Alabama corporation, in receivership (herein "Empire"), and PROTECTIVE LIFE INSURANCE COMPANY, Birmingham, Alabama, an Alabama corporation (herein "Protective").

I. *Identity of Protective.* Protective was incorporated under the laws of the State of Alabama on July 24, 1907, is qualified to do business as a capital stock legal reserve life and health insurance company and had capital and surplus of $25,969,339.96 as shown in its 1972 Annual Statement, of which $19,369,339.96 was indicated as surplus, and as of September 30, 1973 had approximately $26,013,065 of capital and surplus. The executive offices of Protective are located in Birmingham, Alabama.

II. *Identity of Empire; Consideration.* Empire was incorporated under the laws of the State of Alabama on June 27, 1963. At its inception and at various dates thereafter Empire both assumed business from, and ceded business to, various other insurance companies as well as directly issuing life, health and accident and annuity policies. By order of the Circuit Court for the Tenth Judicial Circuit of Alabama (herein "Court") in Equity Case No. 171-687, entered June 29, 1982, Empire was found to be impaired and the Honorable John G. Bookout, Com-

missioner of Insurance, State of Alabama, was named Receiver. The Receiver having determined that the full rehabilitation of Empire did not appear feasible, the Receiver has advertised under order of the Court dated September 12, 1973, for proposals for assumption of the outstanding insurance policies of Empire, and this Agreement is submitted in response to such advertisement and shall constitute a firm and binding contract with Protective when and if accepted by the Receiver and approved by order of said Court, provided, however, that if not so accepted and approved by January 31, 1974 (unless such time be hereinafter extended in writing by Protective), this Agreement shall be null and void and of no further effect.

III. *Effective Date.* The Effective Date of this Agreement shall be 12:01 A.M., C.S.T., on the ..... day of ..... 197 ..., which shall not be a date prior to January 1, 1974.

IV. *Definitions.* As hereinafter used, the following terms shall have the meanings set out below and none other:

A. "Empire Policies" shall mean (1) all life insurance, accident and health and annuity contracts or policies which have been either (i) issued by Empire prior to the Effective Date of this Agreement or (ii) assumed by Empire prior to June 29, 1972, and (iii) which had not been ceded by Empire to, and assumed by or purportedly assumed by, some other company prior to June 29, 1972, (2) all supplemental contracts issued by Empire as a consequence of the policies defined in (1) above, and (3) all supplemental benefits or riders issued in connection with the policies defined in (1) and (2) above. It is expressly understood that the term "Empire Policies" shall not refer to any policy issued on Protective forms as a result of conversion

privileges or purchase options contained in Empire Policies.

B. "Old National Policies" shall mean only that specific block of paid-up insurance which had been written or assumed by Empire and which on or about June 19, 1967, Empire ceded to Old National Insurance Company, Montgomery, Alabama, an Alabama corporation (herein "Old National") and Old National assumed in a reinsurance agreement. Inasmuch as Old National has been found to be insolvent and the receiver of Old National is seeking to set aside and declare void the assumption of the Old National Policies from Empire and is asserting that such policies are the liability of Empire, the "Old National Policies" are a subject of this Agreement as set forth hereinbelow.

C. "Withdrawable Funds" shall mean any funds that may be withdrawn under the terms of a policy by voluntary action of the insured or other owner of such policy and shall normally be equal to the policy cash value plus the cash value of any paid-up additions, any dividend accumulations, any pure endowment accumulations or coupon accumulations, any prepaid premiums on the policy and any contingent pure endowment payments, less all outstanding policy loans.

D. "United Founders Treaty" shall mean that certain Reinsurance Treaty entered into by Empire and Republic Investors Life Insurance Company, East Moline, Illinois, now called United Founders Life Insurance Company of Illinois (herein "United Founders") on or about April 3, 1968.

E. "Assumed Policies" shall mean Empire Policies, Old National Policies, the United Founder Treaty and any policies assumed by Protective after the Effective Date hereof as a result

of or arising out of the administration of the Empire Assets (as defined in Section IX.A.).

V. *Cession and Transfer by Receiver.* The Receiver on behalf of Empire agrees to transfer, assign, cede, deliver and convey, and does hereby transfer, assign, cede, deliver and convey, to Protective, by way of total reinsurance, subject to the terms, conditions and provisions hereof, (1) all of the rights, privileges and prerogatives of Empire in and to those certain policies and contracts of insurance identified herein as Old National Policies and Empire Policies, (2) all rights, claims and interests which Empire has against, or in the receivership estate of, Old National, whether on account of attempted or actual recission of the 1967 reinsurance agreement referred to in Section IV.B. or otherwise, and (3) all of the rights, privileges, prerogatives, contracts, agreements and treaties of reinsurance and/or co-insurance (without assumption) with other insurance companies covering risks of Empire reinsured and/or co-insured with other insurors and covering risks of other insurors ceded to and reinsured and/or co-insured (without assumption) by Empire in effect on the Effective Date hereof, including, but without limitation, all rights and interests of Empire under the United Founders Treaty.

Receiver further agrees to transfer to Protective, subject to the terms, conditions and provisions hereof, all assets of Empire except as specified hereinbelow in Section VII, and agrees to execute any and all documents and take all other action deemed advisable by Protective to effectuate or facilitate the transfer of assets or other assignments and transfers contemplated by this Section V.

Protective agrees to accept the assets so transferred and assigned subject only (without assumption) to the mortgages and other liens and encumbrances thereon but only to the extent that the same are disclosed in Empire's 1972 Annual Statement.

VI. *Assumption by Protective.* Protective does hereby reinsure and assume as of the Effective Date (subject to the terms, conditions and provisions, and only to the extent as, hereinafter specifically provided) the liability of Empire under the Empire Policies and, if any, under the Old National Policies (except as provided hereinbelow), subject, however, to any and all defenses or offsets against the claims and actions on said policies which would have been available to Empire or Old National (as applicable) had this Agreement not been made, and further does hereby assume as of the Effective Date (subject to the terms, conditions and provisions, and only to the extent as, hereinafter specifically provided) all of the rights, privileges, prerogatives, contracts, agreements, treaties or reinsurance and/or co-insurance with other insurors (without assumption) referred to in Section V and the obligations thereunder. The terms and conditions of such assumption are as set forth below in this Section VI and in the remaining provisions of this Agreement:

A. *Old National Policies.* Protective shall endeavor to enter into an agreement with the receiver of Old National to assume the Old National Policies subject to the terms and conditions hereinbelow in Sections VIII, VII and XIV and agree that, if such an agreement cannot be reached, a court of arbitration shall be appointed consisting of three arbitrators, one selected by the Commissioner of Insurance, State of Alabama, one by the Commissioner of Insurance, State of Texas, and one by Pro-

tective, and such court of arbitration shall, after a hearing, draft a reinsurance agreement as to the Old National Policies not inconsistent with any provision contained in this Agreement which shall be binding on said receiver and Protective but limited to policyholder liabilities arising from the Old National Policies. The terms and provisions of Section XVII, except as to the composition of court, shall apply. After the proper execution of such reinsurance agreement on behalf of Old National with all necessary Court or regulatory agency approvals thereof, and after the effective date of such agreement, for the purposes of this Agreement, Old National Policies shall be thereafter considered to be Empire Policies as defined.

After the Effective Date hereof and prior to the effective date of such an agreement, if any, Protective shall pay valid claims under the terms of said Old National Policies on account of deaths occurring on and after the Effective Date (and prior thereto as specified in Section VI.E. below) to the extent that such claims have not been previously paid by either Empire or Old National; provided, however, that (1) Protective shall have all defenses or offsets against claims and actions upon said policies which would have been available to Old National or Empire had this Agreement not been made, (2) no such payment or payments shall be deemed evidence of, or any admission that, the Old National Policies are Protective's obligations to any greater extent than they were liabilities of Empire prior to this Agreement or that Protective is hereby or otherwise assuming any greater obligations on account of Old National Policies than Empire had prior to the Effective Date hereof or otherwise, and (3) that payment of such claims by Protective

shall be taken into account and allowed for in any reinsurance agreement with Old National's receiver.

Protective further agree that, as described further in Section VIII.C. below, any amounts received by Protective from Old National's receiver on account of recission of the 1967 Empire-Old National reinsurance agreement shall be applied to reduce the Moratorium Amounts otherwise applicable to Old National Policies and shall be included in the Empire Assets for the purposes of accounting under this Agreement, all as provided for hereinafter.

B. *United Founders Treaty*. Protective agrees to assume Empire's obligation to United Founders under the United Founders Treaty subject to the moratorium provisions set forth below in Section VIII relating to such treaty. Protective further agrees to assume Empire's obligations under Paragraph 10 of the United Founders Treaty to administer directly under certain conditions the United Founders policies related thereto. Protective agrees that in the event it shall be required under said Paragraph 10 to so administer policies or if it shall elect under Paragraph 12 of said treaty to assume directly the United Founders policies related thereto, there shall be no change in the status of the policyholder thereof nor shall any moratorium be placed in effect against them. In the event of such assumption, the policies so assumed by Protective shall be considered to be "Empire Policies" for all purposes of this Agreement except that they shall not be subject to the provisions of Section VIII and XII relating to Moratorium Amounts and revision of dividend provisions.

C. *Third Party Indemnity Reinsurance Agreements*. Protective accepts and assumes as of the Effective Date all right, title

and responsibilities of Empire under "third party indemnity reinsurance agreements" by which is meant those reinsurance and/or co-insurance agreements with other insurance companies covering risks of Empire reinsured and/or co-insured with other insurors, without assumption, and covering risks of other insurors ceded to and reinsured and/or co-insured by Empire, without assumption. It is not the intention of the parties to affect, nor shall any provisions of this Agreement be construed as affecting, in any way, such reinsurance of a portion of the risk under some of the Empire Policies with any third party reinsuror under existing indemnity reinsurance agreement between Empire and such companies, although Protective expressly reserves the right, and anticipates that it shall exercise the right, under the recapture clause contained in said agreements to adjust the retention on the Empire Policies to Protective's retention levels.

D. *Reinstatement.* Protective agrees to assume Empire's obligation to reinstate any policy which is or should have been in the classes assumed under this Agreement which on the Effective Date hereof by its terms was entitled to reinstatement, provided that all requirements necessary to procure reinstatement of such a policy under its terms are fulfilled to the satisfaction of Protective. Upon such reinstatement of any such lapsed policy, it shall for all purposes be treated as if it had been in force from the date on which it lapsed except that it shall be subject to all of the terms and conditions of this Agreement as may pertain to the class of policy in which it was or should have been.

E. *Pending and Unreported Claims.* Protective agrees to assume Empire's liability in connection with all outstanding claims on Empire Policies or Old National Policies, whether in

process of settlement or incurred but not yet reported as of the Effective Date, provided, however; that Protective does not assume liability on any claim which has heretofore been rejected by Empire or Old National, as applicable, whether or not such claim is being contested in the courts, it being understood that any contingent liability on account of any such rejected claim shall remain the liability of Empire or Old National, as applicable.

F. *Commissions.* Protective agrees to assume Empire's liability with respect to any commission due for premiums collected by Empire before June 29, 1972, but only to the extent that such commission was included in the liabilities reported in the Annual Statement of Empire as of December 31, 1972 and reflected on Empire's books and records. It is expressly understood that Protective is not assuming any obligation for commissions not reflected on such Annual Statement or due on account of premiums collected after June 29, 1972 or to be collected in the future.

G. *Liabilities Not Assumed.* Protective does not assume any liability to policyholders, stockholders or creditors of Empire or Old National not specifically set forth above. In amplification but without limitation of the generality of the foregoing statement, Protective does not assume any liability and shall have no liability for:

1. Any obligation of Empire on account of agreements entered into with other companies under which Empire ceded, and such companies assumed or purportedly assumed, policies issued or assumed previously by Empire (except as set forth in Section VI.A. above).

2. Any claim by creditors of Empire on account of any obligation not arising out of any policy or contract specifically assumed above.

3. Any claim by any person, firm or corporation on account of any guaranty or endorsement or other agreement by Empire with respect to funds borrowed by or advanced to employees, subsidiaries, affiliates or any person, firm or corporation, related or unrelated, whether or not Empire had guaranteed or endorsed such advances or loans prior to the Effective Date hereof.

4. Any dividend claimed by any policyholder of American Trust Life Insurance Company or by any other person, firm or corporation, which dividend was not (a) previously declared by Empire and (b) either (i) paid to the policyholder or (ii) included in the provision for dividend accumulations or for paid-up additions, as shown in Empire's Annual Statement of December 31, 1972. Any such claim alleged on account of any policy, whether or not such policy is assumed by Protective under this Agreement, shall be the sole liability of Empire.

5. Any surplus debenture or other evidence of indebtedness whatsoever issued by Empire or by any company and assumed by Empire prior to the Effective Date hereof.

6. Any obligation for commission which may have been due on account of premiums collected or to be collected after June 29, 1972.

7. Any and all obligations for unpaid premium taxes.

8. And deficiency with respect to any mortgage on real estate transferred to Protective.

VII. *Assets to be Transferred.*

A. The Receiver on behalf of Empire agrees to transfer,

assign, deliver and convey to Protective, and take all necessary action and execute all appropriate documents to convey to Protective good and merchantable legal title to, all assets of Empire, except that Receiver may retain the sum of Two Million Dollars ($2,000,000) in cash or liquid assets to be used to pay the expenses of the receivership and to satisfy creditors for liabilities not assumed by Protective hereunder. In the event that the Receiver shall have settled with all such creditors and there shall be left to the account of Empire under the administration of the Receiver any funds, then if Moratorium Amounts (as defined) are still outstanding against any policies which are the subject of this Agreement or if the Moratorium Amounts shall have been cancelled on account of the expiration of the fifteen year period referred to in Section VIII.D.3. below, then such funds in the account of Empire shall be transferred to Protective to be added to the Empire Fund (as defined below) for use in further reducing the outstanding Moratorium Amounts or to reimburse Protective for any prior reduction of Moratorium Amounts pursuant to the terms hereinafter set forth.

B. If, as of the Effective Date hereof, Protective shall not have received authorization under the respective Insurance Holding Company System Regulatory Acts of Nebraska or Arkansas, or both, to assume control of Lincoln Life and Casualty Company or of Investors Preferred Life Insurance Company, respectively, then the Receiver shall, as escrow agent for the benefit of Protective, continue to hold all Empire's shares of common stock of National Insurance Company of America or Investors Preferred Life Insurance Company, as the case may be, in trust for Protective until such authorization has been obtained, and when so obtained the Receiver shall transfer the shares evidenc-

ing said common stock to Protective as promptly as practicable. With respect to all securities to be transferred by Receiver to Protective, Protective hereby represents to Receiver that it is taking said securities for investment and not with a view to distribution.

C. The assets of Empire to be transferred to Protective shall be valued for statutory purposes and in determination of the amount of the Empire Fund (as defined) as follows:

1. *Bonds, Real Estate, Mortgages, Collateral Loans and Preferred Stocks.* Empire's bonds, real estate, mortgages, collateral loans and preferred stock shall be transferred to Protective at a value equal to their admitted asset value to Empire on the Effective Date hereof. Said value, adjusted thereafter as required by proper statutory accounting, shall be used in determining the admitted asset value to Protective of such assets and in determining the value of the Empire Fund.

2. *Common Stocks.* All commonstocks owned by Empire shall be transferred to Protective at their market value as of the Effective Date hereof and shall be valued thereafter in determining the value of the Empire Fund at the market value at the valuation date in question, except that stock of "affiliates", as defined in the Alabama Insurance Holding Company Systems Regulatory Act, shall be valued in accordance with Section 3 thereof, and provided further, if there is no readily ascertainable market value for a common stock, Protective shall make a reasonable attempt to obtain a reasonable value for such security, which value shall be its value for Empire Fund purposes. However, if a value for a common stock cannot be reasonably obtained, such stock shall be treated as having no value for

Empire Fund purposes but shall remain an asset of the Empire Fund.

3. *Furniture, Equipment and Supplies.* In lieu of any separate accounting for all furniture, equipment and supplies of Empire, Protective shall credit the Empire Fund with One Thousand Dollars ($1,000) and shall have no obligation thereafter to account for such assets in the Empire Fund or otherwise for the purposes of this Agreement.

4. *Agents' Debit Balances.* No value shall be placed on the agents' debit balances of Empire; however, any amounts recovered on account of such balances shall be credited to the Empire Fund.

5. *Libbie Shearn Moody Trust Interests.* For the purposes of Protective's Annual Statement and the determination of the amount of the Empire Fund, the interest in said Libbie Shearn Moody Trust shall be valued at that certain value established by the N.A.I.C., that is, Four Million Two Hundred Fifty Thousand Dollars ($4,250,000). Protective shall be entitled to increase or decrease such stated value if it appears warranted, provided, however, that such adjustment must be acceptable or required for statutory accounting purposes in Protective's Annual Statement. Receiver represents and warrants to Protective that (i) the Libbie Shearn Moody Trust is a valid and enforceable trust with a duration at least as long as the life of Shearn Moody, (ii) Empire has a valid, enforceable and assignable right to 40% of the life interest of Shearn Moody in one-eighth (1/8) of the income of said Trust, and (iii) those certain insurance policies issued on the life of Shearn Moody by Empire State Life Insurance Company of Houston, Texas, designated as Policy Nos. YT-206948-A, YT-208415 and 69YT-208623, as-

sumed on December 31, 1972 by National Western Life Insurance Company, Denver, Colorado, each containing provisions providing for renewal of such coverage until the policy anniversary nearest the insured's sixty-fifth birthday and providing total death benefits in the event of Shearn Moody's death in the amount of Twelve Million Dollars ($12,000,000.00) shall be in force on the Effective Date hereof on a premium paying basis with premiums due thereon paid to the next policy anniversary of each such policy, and the Receiver further agrees that ownership of these policies shall be transferred to Protective and that Protective shall be named the sole beneficiary under all such policies.

6. *Other Assets.* All other assets shall have the normal values assigned to them pursuant to statutory accounting principles and practices.

It is expressly recognized by the parties to this Agreement that the foregoing valuation methods and the values expressed therein or derived thereby are for purposes of statutory accounting and determination of the amount of the Empire Fund and shall not be construed as constituting stipulated values for federal income tax purposes. For federal income tax purposes, the value of the foregoing assets shall be determined in accordance with the normal accounting principles and practices for such transactions. It shall be assumed that the value utilized for such assets in federal income tax returns of Protective shall be the value to Empire for tax accounting purposes of these assets.

VIII. *Moratorium.* Inasmuch as the assets of Empire are insufficient to meet its liabilities including reserves, it is necessary to, and Protective shall, place a moratorium against the

Withdrawable Funds under the policies assumed by Protective hereunder in accordance with the following agreements:

A. *Basis of Moratorium Amounts.*

1. With respect to policies described in Section IV.A. and IV.B. and not described hereinbelow in this paragraph A, the initial Moratorium Amount shall be determined based on the Withdrawable Funds of the policy as of the Effective Date hereof and a policy without Withdrawable Funds shall not be subject to any moratorium. However, for the purposes of determining the initial Moratorium Amount of any policy, any policy loan requested of Empire subsequent to June 29, 1972 shall be disregarded.

2. With respect to the separate accounts maintained on account of policies issued by Empire Life Insurance Company of America, Little Rock, Arkansas, on Form PSIP-1, the Arkansas separate account, and by National Union Life Insurance Company on Form SPP50, the Alabama separate account, the initial Moratorium Amount as of the Effective Date hereof shall be figured against the total values of those separate accounts and if any amount is allocable to a policyholder under the terms of any such contract, the pro rata portion of the then current Moratorium Amount relating to the total separate account involved shall also be allocated to such policyholder. If the amount of the accumulation of any such policyholder in the separate account is to be paid out in cash, such payment shall be reduced by such Moratorium Amount and the acceptance of such amount by the policyholder or other recipient shall constitute full release of Protective with respect to the Moratorium Amount retained. If the amount of such payment is to be added

to the dividend accumulating otherwise credited to such policy, which shall constitute the standard procedure in such case unless the policyholder specifically requests otherwise in writing, then the Moratorium Amount shall be added to and increase the Moratorium Amount otherwise outstanding on such policy.

3. With respect to the United Founders Treaty, the initial Moratorium Amount shall be calculated based upon the total policy reserves on policies covered by such treaty, less the total policy loans and net deferred and uncollected premiums as of the Effective Date (hereinafter said adjusted total policy reserves being referred to as "Net Reserves").

B. *Effect of the Moratorium.*

1. With respect to those policies described in Section IV.A and IV.B., the moratorium shall not affect any contractual policy benefit except as provided under Section XII with respect to dividends and except as provided below with respect to cash surrenders, policy loans, partial withdrawals, policy conversions or similar policy options and privileges, and determination of nonforfeiture benefits, and the moratorium shall reduce these benefits as follows:

(a) If such a policy is surrendered, the applicable Moratorium Amount shall be deducted from the cash value otherwise payable under the terms of the policy. Acceptance of such reduced cash value by the policyholder shall be a total release of all claims against Protective on account of or in any way arising out of the policy. If any policy shall contain a provision under which the policyholder may continue such policy as paid-up insurance, in whole or in part, without supplying evidence of insurability, or may take a cash payment in lieu

thereof, regardless of the description in the policy of such payment, it shall be construed as a cash surrender for purposes of the moratorium.

(b) The Moratorium Amount, while not requiring interest, shall otherwise be treated as an addition to any outstanding policy loans for the purposes of applying any policy provisions relating to or referring to policy loans, conversions, exchanges, and similar options and privileges, except that it shall not reduce any death benefit or any benefits payable on maturity of the policy as an endowment other than as specified in subsection (a) above.

(c) If a policyholder has any option, right or privilege to withdraw any amounts from the policy prior to maturity, such option, right or privilege shall only permit withdrawal of funds otherwise available in excess of the Moratorium Amount.

(d) If the policy shall be placed on reduced paid-up or extended term insurance, the amount of the reduced paid-up or the amount and period of such extended term insurance, as the case may be, shall be computed based upon a value equal to the value specified to be used in the policy reduced by one-half of the then applicable Moratorium Amount. The death benefit thus reduced shall not be increased thereafter on account of any subsequent reduction in the Moratorium Amount. The current Moratorium Amount shall be continued against such paid-up insurance, subject to reduction as provided in Section VIII.D. below, and shall be deducted from the cash surrender value of such paid-up insurance if it shall be surrendered before Moratorium Amounts are cancelled and likewise shall be deducted for the purposes of determin-

ing available policy loan values. Notwithstanding the foregoing, the reinstatement provisions of the policies shall still be effective.

(e) Any policy which became reduced paid-up or extended term insurance after June 29, 1972 and prior to the Effective Date shall have benefits based upon the foregoing provisions except that the Moratorium Amount shall be computed on Withdrawable Funds as of the date such reduced paid-up or extended term insurance became effective.

2. With respect to the United Founders Treaty, no death benefits shall be affected; however, any cash surrender value payable to United Founders under the terms of the Treaty on account of the surrender of a policy covered by such Treaty shall be reduced by an amount equal to the product of such cash value times a fraction the numerator of which is the then current Moratorium Amount on the Treaty and the denominator of which is the then current Net Reserve under the Treaty, both values being computed as of the date of surrender of such policy. The Moratorium Amount of the Treaty shall be reduced by the amount of such cash surrender value reduction. Such cash surrender value reduction shall be permanent and United Founders shall have no further claim against Protective on account of such policy surrender, whether or not the Moratorium Amount is subsequently reduced as hereinafter provided for. With respect to policy loans under the United Founders Treaty, inasmuch as the Treaty makes no specific provision for participation by Empire in policy loans prior to the assumption date of any such insurance by Empire but Empire has been participating in such policy loans, any policy loans after the Effective Date hereof shall be solely for the account of United Founders

and United Founders shall bear all increase in aggregate outstanding policy loans thereafter from its own assets until such time as the ratio of the aggregate outstanding policy loans borne by United Founders on policies under the Treaty (whether incurred before or after the Effective Date hereof) to the aggregate outstanding policy loans on such policies equals the ratio of the then current Moratorium Amount on the Treaty to the total Net Reserves under the Treaty. Thereafter, Protective shall share proportionally in future policy loans. In the event Protective directly assumes the policies covered by the Treaty, United Founders shall not be reimbursed by Protective in any way on account of existing policy loans at the time of assumption.

C. *Moratorium Amounts.*

1. With respect to those policies described in Section IV.A., the initial Moratorium Amount shall be thirty-five percent (35%) of the Withdrawable Funds as of the Effective Date.

2. With respect to the separate accounts, the initial Moratorium Amount shall be thirty-five percent (35%) of the total value of those accounts at the Effective Date.

3. With respect to the United Founders Treaty, the initial Moratorium Amount shall be thirty-five percent (35%) of the Net Reserves under the Treaty as of the Effective Date.

4. With respect to the Old National Policies, the initial Moratorium Amount shall be one hundred percent (100%) of the Withdrawable Funds and shall so remain even if Moratorium Amounts on other policies are lowered, until the reinsurance agreement between Protective and the receiver of Old National referred to in Section VI.A. is effective. As of the effective date of such reinsurance agreement, the Moratorium Amount on each

Old National Policy shall be adjusted to be equal to the product of the Withdrawable Funds multiplied by a fraction the numerator of which is the sum of (1) the reserves for all in-force Old National Policies; plus (2) all claims incurred on such policies after June 19, 1967 which were paid by Protective or Empire or which Protective is hereby obligated to pay after the effective date of such reinsurance agreement, less (3) the value of any assets transferred by the receiver of Old National to Protective pursuant to such reinsurance agreement, and the denominator of which is the reserves for all in-force Old National Policies. Such Moratorium Amount for any of the Old National Policies shall not exceed one hundred percent (100%) of the Withdrawable Funds of the policy as of the effective date of such reinsurance agreement.

D. *Reduction and Cancellation of Moratorium.*

1. If the Empire Fund, as described in Section IX, shall exceed one hundred five percent (105%) of the Empire Liabilities as defined in Section X less the then outstanding aggregate Moratorium Amounts as of December 31 of any year, then as of April 1 of the following year, all the then outstanding Moratorium Amounts shall be proportionally reduced to such an amount that, as of such December 31, the Empire Fund would have equaled one hundred and two percent (102%) of the Empire Liabilities less the outstanding reduced Moratorium Amounts.

2. If after any such adjustments as described in D(1) next above, the then outstanding Moratorium Amounts shall be less than one hundred twenty percent (120%) of one year's annual premium on all premium paying Empire Policies in force on

such December 31, all outstanding Moratorium Amounts shall be cancelled on April 1, and Protective shall thereafter pay all policy benefits in full except as hereinafter provided in Section XII with rspect to dividends and except with regard to policies with reduced paid-up or extended term benefits elected after June 29, 1972 and prior to such cancellation.

3. If there are any Moratorium Amounts outstanding at the expiration of a period of fifteen (15) years after the Effective Date of this Agreement, all such Moratorium Amounts shall be cancelled.

4. Protective shall have the right at any time and from time to time to voluntarily reduce or eliminate any or all Moratorium Amounts, in its sole discretion, whether or not required by any provision hereof.

5. When all Moratorium Amounts are cancelled, Protective shall be relieved from any responsibility or accountability for separate fund accounting for any policy previously affected by the Moratorium Amounts hereunder.

E. *Statutory Treatment of Moratorium Amount.* The Moratorium Amounts shall be treated as a credit against the reserve on the applicable policies in the Annual Statements of Protective.

IX. *Empire Fund.* The "Empire Fund" shall consist of:

A. The "Empire Assets" which shall include:

1. All assets, other than cash or equivalents and other than the furniture, equipment and supplies described in Section VII C.3 transferred to Protective under Section VII hereof prior to the disposal thereof by Protective;

2. Property acquired by Protective from the disposal of property otherwise defined as an "Empire Asset" or transferred to Protective by the receiver of Old National under the provisions of Section VI.A.; and

3. Policy loans and net due and deferred premiums on Assumed Policies, plus

B. A share in Protective's fixed income investments, sometimes referred to as "commingled assets", the amount and yield of which shall be determined as follows:

1. Cash and equivalents transferred to Protective but not included in the assets under Section IX.A.1. above, plus the $1,000 stipulated payment under Section VII.C.3. shall be treated as invested as a part of all fixed income investments made by Protective in the first calendar quarter after the Effective Date hereof, and such assets shall be assumed to have the same yield as the average of all such investments made in said quarter.

2. Thereafter, an amount shall be treated as invested during the year in which the same becomes available, which amount is equal to the sum of (i) the profits to Protective on disposal of any Empire Asset, plus (ii) the increase in Empire Liabilities, plus (iii) the Empire Operating Earnings (as hereinafter defined) or less the losses thereof, plus (iv), in the year received, any cash transferred to Protective by the receiver of Old National under the provisions of Section VI.A. or from the Receiver of Empire under Section VII.A. on account of settlement of all outstanding creditor claims or under Section XIV, less (v) losses on disposal of Empire Assets, and less (vi) decreases in Empire Liabilities, said sum to be increased

or decreased, as applicable, by the change in total value of Empire Assets other than that change caused by revaluation of any Empire Assets. This amount shall be invested and commingled with Protective's fixed income investments for said year and shall be credited thereafter with the yield equal to the average long term fixed yield rate obtained by Protective on its fixed income investment made in the year such amount is treated as invested (as information, this rate was 9.21% in 1971, 9.23% in 1972 and is anticipated to be between 8% and 9% in 1973). If the amount calculated as specified hereinabove in this subparagraph (2) is negative, the Empire Fund shall be debited as if a portion of the commingled assets referred to above had been sold and the adjustment to yield on commingled assets due to such assets deemed to have been sold shall be determined on the basis set forth above.

C. The requirements for maintenance of the Empire Fund while any Moratorium Amounts are outstanding shall in no way limit Protective's right, in its sole and absolute discretion, to dispose of any of the Empire Assets as it may deem desirable or advisable.

X. *Empire Liabilities.* "Empire Liabilities" shall equal:

A. All reserves and other liabilities of Protective arising from the Assumed Policies; plus

B. Any debt, loss reserves or other liabilities of Protective either existing at the Effective Date hereof or arising thereafter on account of the Empire Assets.

XI. *Empire Operating Earnings.* "Empire Operating Earnings" for any years will be determined as equal to:

A. (1) premiums and other considerations received by Pro-

tective on Assumed Policies less any third party indemnity reinsurance premiums paid by Protective on Assumed Policies; plus

(2) investment income on the Empire Fund which shall be all investment income received on account of Empire Assets plus the assumed yield on the commingled assets described in Section IX.B., less investment expenses defined below in Section XI.D.; plus

(3) any miscellaneous income received by Protective in connection with the Assumed Policies, less the sum of:

B. (1) all benefits and dividends paid on the Assumed Policies; plus

(2) the increase in Empire Liabilities for the year; plus

(3) premium taxes incurred on the Assumed Policies; plus

(5) an expense allowance for Protective equal to ten dollars ($10.00) per premium paying Assumed Policy and five dollars ($5.00) per paid-up Assumed Policy in force at the beginning of the year; plus

(6) any extraordinary expenses arising out of the Assumed Policies which would not normally be incurred in the course of the transaction of life insurance business by Protective, including those expenses involved in maintaining and operating an office in Dallas, Texas and the current data processing system used by Empire until administration of the Assumed Policies can be efficiently transferred to Protective's Birmingham Main Office, plus the identifiable costs of such transfer.

C. Empire Operating Earnings shall be increased or decreased, as appropriate, by the marginal change in Protective federal income tax liability arising as a result of the consummation of this Agreement or from Empire Assets, Empire Liabilities and Empire Operating Earnings in the current year.

D. "Investment Expenses" as used hereinabove shall be equal to the sum of:

(1) all out-of-pocket expenses specifically incurred in connection with the Empire Assets, including, but not limited to, all expenses incurred in connection with the administration of real estate transferred to Protective by Empire, and

(2) premiums paid on insurance policies covering the life of Shearn Moody and protecting Protective's life interest in the Libbie Shearn Moody Trust as described in Section VII.C.5. hereof, and

(3) 5.5% of al linvestment income credited in Section XI.A.2. above, as an administrative charge for supervision of such investments.

E. Protective shall have the right to use reasonable approximations in making the calculations called for by the foregoing provisions. To the extent not otherwise specifically provided for in the foregoing, such amounts shall be calculated in accordance with statutory insurance accounting principles and practices as used in Protective's Annual Statement.

XII. *Dividend Provisions Superseded.*

A. *Revision of Dividend Provisions.* Certain policies assumed by Empire from American Trust Life Insurance Company specifically included provisions by rider or in the basic

policy which specified dividend levels as a percent of earnings on American Trust Life business. Empire assumed such obligations upon assumption of such policies but Protective is not willing to assume such obligations. Other policies either issued or assumed by Empire, by policy provision, written or implied sales materials or oral representations may have created similar obligations or created the expectation of similar obligations on the part of the insured, and Protective is not willing to accept and assume any such obligation. Therefore, as a condition precedent to the assumption of any policy by Protective under this Agreement, it is agreed that the owner of any Assumed Policy which is participating or in ay other way has a claim against the earnings of the issuer thereof expressly must agree, and by failure to reject the Certificate of Assumption as hereinafter provided such policyholder shall be deemed to have agreed to the following reformation, modification and amendment of each such policy with regard to the payment of dividends:

1. If a policy is participating or contains any provision which may be construed to be a claim upon the earnings of the company issuing or assuming the policy or the policyholder of such policy claims any such right for any reason, the following provision shall be substituted for any or all such provisions of the existing policy:

Dividends. Any dividend paid on this policy shall be as declared in the sole and absolute discretion of Protective and no contractual provision or written or oral promise, express or implied, heretofore made to the policyholder shall bind Protective to declare or pay any dividend. Protective may, in its sole and absolute discretion, declare no dividend or a dividend in such amount as it may deem advisable.

2. Each person ot expressly rejecting, ad thereby accepting, an assumption agreement from Protective pursuant to the terms hereof shall be deemed to have released Protective (1) from any and all obligation under such policy or otherwise to declare any dividend whatsover on such policy and (2) any liability for any misrepresentation or fraud of any person with respect to any statement regarding dividends on the policy.

However, the foregoing shall not be construed to apply to the guaranteed minimum of ten dollars ($10.00) per One Thousand Dollars ($1,000) "dividend" provided under Form PSIP, the President's Special Investors Plan, issued by Empire Life Insurance Company of America, Little Rock, Arkansas and assumed by Empire, which dividend commitment is in the nature of a pure endowment or coupon benefit and accordingly will be paid by Protective in the same manner as such benefits.

B. *Contingent Paid-Up Additions*. Protective has no obligation to declare dividends on any participating policy of Empire. If, however, in its sole and absolute discretion, Protective should determine that dividends of some amount should be paid to such policyholders while Moratorium Amounts are still outstanding, it is hereby specifically agreed that Protective may declare contingent paid-up addition dividends prior to the time all Moratorium Amounts are removed as provided in Section VIII.D. above but a declaration of such dividends shall in no respect be deemed to be a waiver by Protective of its right not to declare such a dividend at any time in the future or on any other policies. Such contingent paid-up addition dividends shall provide an increase in death benefit in the event the insured shall die while such contingent paid-up addition dividends are outstanding on the policy. However, in the event the

policyholder shall surrender his policy or elect a reduced paid-up or extended term insurance benefit under the nonforfeiture provisions of any such policy, the policyholder shall lose all claim on such contingent paid-up additions and Protective shall have no further obligation on account thereof. Such contingent paid-up additions shall cease to be contingent when all Moratorium Amounts have been cancelled on all policies and at that time shall become regular paid-up additions. The determination of equitable treatment between classes of policyholders shall be made in the sole and absolute discretion of Protective.

C. *Dividends After the Moratorium Period.* Protective agrees that when all Moratorium Amounts have been cancelled, it shall attempt to place any of the Assumed Policies that are then participating on a basis of substantial equity with similar policies issued by Protective at the same time as the Assumed Policy but only with respect to dividends for those years after the amount of the Empire Fund shall exceed the amount of the Empire Liabilities. Such dividends shall be payable only at the sole and absolute discretion of Protective and the policyholder shall be entitled to elect any form of dividend payment option normally available to Protective's participating policyholders; however, if no option election is filed with Protective after the Effective Date hereof and prior to such dividend payment, the paid-up addition option shall be deemed to have been elected. The determination of a basis of substantial equity between classes of policyholders shall be in the sole and absolute discretion of Protective.

XIII. *Assumption Certificates.* Protective agrees that, as promptly as possible after the Effective Date hereof, it shall issue to each policyholder whose policy is reinsured by it here-

under an assumption certificate dated as of the Effective Date and substantially in form and with the provisions set out in Exhibit "A" attached hereto and made a part hereof [or with such modifications as may be approved by the Receiver], subject to (i) the written terms and conditions of each such policy, as modified by this Agreement and (ii) any and all offsets, counterclaims, cross-actions and defenses which are now or may hereafter become available to Empire or Protective, and all such offsets, counterclaims, crossactions and defenses held, owned or possessed by Empire are hereby transferred, assigned and conveyed by it and the Receiver to Protective. Such assumption certificate shall be mailed by Protective by first class mail addressed to the policyholder at the address shown upon the records of Empire.

XIV. *Right to Reject Assumption.* It is specifically recognized and agreed by the parties hereto that each of the policyholders of any policy which is the subject of this agreement has a valid claim against the receivership estate of Empire in an amount equal to the Withdrawable Funds of his or her policy. Each policyholder affected by this Agreement shall have the right and privilege of an election either to accept in full the terms of this Agreement and the assumption certificate or to reject the same in full in writing by filing such rejection at the office of John G. Bookout, Receiver, within sixty (60) days after such assumption certificates are mailed to policyholders. All policyholders who have not so rejected this Agreement and the assumption certificate within such period shall be conclusively deemed and considered to have accepted all provisions of this Agreement and the assumption certificate and to have further agreed that Protective, on behalf of all such policy-

holders against whose policies and contracts any moratoriums have been placed, shall have the right to file a claim with the Receiver in the amount of the total of the moratoriums. Any dividend distributions on such claim received by Protective from the Receiver shall be added by Protective to the Empire Fund. It is agreed and understood that Protective shall have no obligation with respect to such claim or the prosecution or collection thereof other than the filing thereof with the Receiver and the acceptance and application, as described above, of any dividend distributions Protective may receive as a result of such claim. Protective agrees to transfer to the Receiver assets equal in value to the assets herein transferred to Protective covering the reserves on policies of such policyholders who may reject this Agreement and assumption certificate within the period specified above, less the applicable Moratorium Amount on each such policy. Any such policyholder rejecting this Agreement and the assumption certificate by giving written notice thereof to the Receiver within such period will be entitled to make his own claim directly to the Receiver and shall receive no benefit under or by virtue of this Agreement.

XV. *Premiums and Other Receipts.* All premiums and payments on any policies assumed by Protective which are paid by the policy owners on and after the Effective Date hereof shall be the sole property of Protective, and neither the company, nor receivership estate thereof, from which such policies were so assumed shall have any right, title or interest therein. All moneys, checks, drafts, money orders, postal notes, and other instruments received by the Receiver for premiums on the policies assumed under this Agreement and attributable to periods after the Effective Date shall be forthwith transferred and de-

livered to Protective and any such instruments when so delivered shall bear all endorsements required to effect the transfer of same to Protective. The Receiver and Protective agree that Protective shall have all of the rights of Empire under outstanding bank draft authorizations from policyholders which authorized Empire to draw on the policyholders' bank accounts to pay premiums on the policyholders' insurance policies transferred by the Receiver to Protective, so far as permitted by the laws of the applicable states, and Protective, as part of this Agreement, assumes the guaranty obligations of Empire with resepct only to such bank draft authorizations outstanding as of the Effective Date hereof. Protective shall have the right and authority to collect for the account of Protective all receivables and other items which shall be transferred by the Receiver to Protective and to endorse without recourse and without warranties of any kind the name of Empire on ay checks or other evidences of indebtedness received by Protective on account of any such receivables or other items. Receiver agrees to execute all documents or instruments as may be necessary to assure that any endorsement in accordance with the provisions of this paragraph by Protective of Empire's name shall be recognized and accepted. The Receiver agrees that he will transfer and deliver to Protective any cash or other property that the Receiver may receive with respect to such receivables or other items.

XVI. *Records.* The Receiver agrees to deliver to Protective all of Empire's files and records relating to policies ceded hereunder and assets transferred hereunder. Protective agrees that the Receiver shall be entitled to inspect, audit and copy any and all of such records thereafter if needed to carry out the further duties of the receivership.

XVII. *Arbitration Clause.* All disputes or differences between the two contracting parties arising under or relating to this Agreement upon which an amicable understanding cannot be reached shall be decided by arbitration pursuant to the terms of this section, except that the court of arbitrators for the matters set forth in Section VI.A. of this Agreement shall be constituted as provided therein.

The court of arbitrators provided for herein shall place a liberal construction upon this Agreement in light of the prevailing customs and practices for reinsurance in the life insurance industry, free from legal technicalities, for the purpose of carrying out the intent of the parties.

The court of arbitrators, which shall be held at the home office of Protective in Birmingham, Alabama, shall consist of three arbitrators who must be officers of life insurance companies familiar with the reinsurance business, other than Protective.

Within thirty (30) days of written demand of either party to arbitrate any dispute arbitrable under this Section XVII, each of the parties shall appoint an arbitrator, notifying the other party of the name and address of such arbitrator. The two arbitrators so appointed shall thereupon select a third arbitrator. If either party shall fail to appoint an arbitrator as herein provided, or should the two arbitrators so named fail to select a third arbitrator within thirty (30) days of their appointment, then, in either event, the President of the American Life Insurance Association or its successor shall appoint such second and/or third arbitrator. The three arbitrators so selected shall constitute the court of arbitrators.

A decision of a majority of said court shall be final and binding and there shall be no appeal therefrom. The court shall not be bound by legal rules of procedure or evidence but shall establish its own procedures and receive evidence in such a way as to do justice between the parties. The court shall enter an award which shall do justice between the parties and the award shall be supported by written opinion.

The costs of arbitration, including the fees of the arbitrators, shall be borne by the losing party unless said court shall decide otherwise.

XVIII. *Conditions Precedent.* In addition to any other conditions precedent to Protective's obligations hereunder which may have been hereinabove set forth, Protective shall have the right, in its sole discretion, prior to the Effective Date hereof, to terminate and render void this Agreement, without liability to any person therefor or hereunder, upon the failure of the Receiver to tender or furnish to Protective, no later than five (5) days before said Effective Date, except with respect to (a) which shall be furnished fourteen (14) days before said Effective Date, any one or more of the following:

(a) (i) the Trust Agreement and related documents establishing that the Libbie Shearn Moody Trust is a valid and enforceable trust with a duration at least as long as the life of Shearn Moody and (ii) all documents necessary to show a valid, enforceable and assignable right in Empire to 40% of the life interest of Shearn Moody in one-eighth (1/8) of the income of said trust;

(b) duly executed, legally binding and assignable notes from the policyholders for each policy loan (except pre-

mium loans) shown on Empire's books with the face amount of none of such loans exceeding, except nominally, the cash surrender value of the respective policy (tender at the Empire home office shall be deemed compliance with this provision);

(c) evidence that all notes and mortgages to be transferred to Protective are valid and binding; evidence of full fire and extended coverage insurance on the real property subject to such mortgages; and evidence of the assignability thereof to Protective;

(d) title binders from approved solvent title insurance companies on all real estate with individual values in excess of $100,000 to be transferred to Protective sufficient to insure Protective's title in amounts not less than those shown in Empire's 1972 Annual Statement with respect to each parcel of real estate and showing Empire's ownership to be free and clear of all liens and encumbrances except those disclosed in Empire's 1972 Annual Statement;

(e) all equity and debt securities of Empire to be transferred hereunder in form for transfer (except to the extent provided for in Section VII.B. hereof), free and clear of all liens and encumbrances except as disclosed in Empire's 1972 Annual Statement;

(f) a schedule of all assets to be transferred; and

(g) (i) evidence that the representations of the Receiver contained in Section VII.C.5. are true and (ii) the policies on the life of Shearn Moody referred to in Section VII.C.5. in the full amount stated therein, and forms with all signatures thereon necessary for assignment to Protective as owner and beneficiary as of the Effective Date.

Protective shall further have said right to terminate prior to the Effective Date upon the occurrence of any of the following facts (or opinion in the case of subparagraph (c)):

(a) that those assets of Empire to be transferred are not those shown i the 1972 Annual Statement or assets of equivalent value substituted therefor, except that certain assets may be or may have been sold under Court order between December 31, 1972 and the Effective Date and the cash proceeds thereof shall constitute part of the $2,000,000 not to be transferred;

(b) that there has been at any time up to the Effective Date any damage, destruction or loss not fully covered by insurance materially and adversely affecting any assets to be transferred to Protective;

(c) that, in the opinion of counsel for Protective, the interest in the Libbie Shearn Moody Trust agreed to be transferred is not valid and enforceable for the lifetime of Shearn Moody or is not assignable to Protective by Empire.

Protective may, without prejudice to its rights otherwise under this Agreement, waive one or more of such conditions in a separate writing executed by its President.

XIX. *Conditions Subsequent.*

A. Protective shall have the right to terminate and rescind this Agreement and the assumption certificates, and upon recission, Protective shall be absolutely relieved of all of its obligations thereunder, upon the happening of either of the following occurrences at any time within the time periods set forth below:

(i) any timely appeal from any order of the Circuit Court for the Tenth Judicial Circuit of Alabama in Case No. 171-687;

(ii) any lawsuit filed in any court in which a claim is made attacking this Agreement or its validity, whether or not Protective is a party to such lawsuit; provided that such lawsuit is filed within six (6) months of the entry of the final order of the Circuit Court for the Tenth Judicial Circuit of Alabama in Case No. 171-687 approving this Agreement.

Upon the occurrence of the filing of an appeal as described in subparagraph (i) or a lawsuit as described in subparagraph (ii), Protective shall have fifteen (15) days following written notification to Protective by the Receiver (or any other written notice in fact received by Protective) of the filing of such an appeal or of such a lawsuit to elect to terminate and rescind this Agreement pursuant to this Section. If Protective shall fail to make such election to terminate and rescind this Agreement within said period of fifteen days, its obligations hereunder shall remain in full force and effect notwithstanding any such appeal or lawsuit.

B. In the event that any court shall enjoin or otherwise order or decree (preliminary or otherwise) Protective not to perform any or all of its obligations incurred under this Agreement, for however long as such injunction, order or decree shall be outstanding, Protective shall be absolutely relieved from performing any obligation incurred hereunder to the extent that such performance would result in a violation of any such injunction, order or decree; provided that Protective shall use its best efforts to have any such injunction, order or decree dissolved and set aside.

XX. *Other Provisions.*

1. This Agreement shall insure to the benefit of and be binding upon the successors and assigns of Empire, Protective and the Receiver.

2. All prior or contemporaneous agreements and representations are merged into this Agreement, which, together with the exhibit hereto, constitutes the entire contract between the parties. No amendment or modification hereof shall be of any force or effect unless in writing and signed by the parties.

3. This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Alabama, except that it is agreed that the provisions of Section VI.A. and Section XVII, relating to arbitration of disputes hereunder, shall be governed by the Federal Arbitration Act, 9 U.S.C. § 1, *et. seq.*

4. Nothing herein, express or implied, is intended, or shall be construed, to confer upon or give any person, firm or corporation, other than Protective, Empire and the Receiver, any rights or remedies under or by reason of this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed as of the day and year first above written.

John G. Bookout, Commissioner of
Insurance, State of Alabama, as
Receiver for Empire Life Insurance
Company of America.

ATTEST:
W. C. Brannon
Secretary

PROTECTIVE LIFE INSURANCE COMPANY
By Wm. J. Rushton
President

EXHIBIT "A"

CERTIFICATE OF ASSUMPTION

INSURED:_____

ORIGINAL POLICY NUMBER_____

ASSUMPTION NUMBER_____

This is to certify that Protective Life Insurance Company, pursuant to a Treaty of Assumption and Bulk Reinsurance (herein "Treaty") between John G. Bookout, Commissioner of Insurance, State of Alabama, as Receiver for Empire Life Insurance Company of America, Montgomery, Alabama, and Protective Life Insurance Company ("Protective"), hereby assumes al lliability under the policy described above issued or assumed by Empire Life Insurance Company of America, in accordance with the conditions and terms hereof but subject to the more detailed terms and conditions specified in said Treaty, as of 12:01 A.M., C.S.T., the _____ day of _____, 197____, subject to any defenses available to Empire Life Insurance Company of America on said date.

Whereas, Empire Life Insurance Company of America was insolvent as of the effective date of the Treaty and the assets of said Empire Life Insurance Company of America were insufficient to provide all benefits to policyholders and to pay all creditors, the Treaty imposes certain limitations on the rights of the policyholder of the policy assumed hereunder. Acceptance of such limitations by the policyholders is a condition precedent to this Certificate of Assumption becoming effective. Accompanying this assumption certificate is a summary of the more

important terms of the Treaty affecting the policyholder. Upon written request prior to December 31, 1975, Protective will supply the policyholder with a copy of the complete text of the Treaty, which is on file with the Commissioner of Insurance, State of Alabama. Among the conditions precedent to this assumption is the imposition of a temporary moratorium against the withdrawable values of this policy. The initial amount of the moratorium is 35% of the withdrawable values as of the effective date of the Treaty. This moratorium amount can never increase. The moratorium must terminate, at the latest, fifteen years from the date of the assumption; it may be cancelled prior to that time and under certain conditions may be reduced as often as annually. Such moratorium affects only the cash surrender and loan value, those options and privileges relating to such values (such as conversion, exchange, and partial withdrawal) and nonforfeiture benefits under the policy. Death and endowment at maturity benefits will be paid in full.

As a further condition precedent to the effectiveness of this assumption certificate, if the policy for which this certificate is issued is a participating policy or if for any other reason a claim may be asserted by virtue of said policy against the earnings of Empire Life Insurance Company of America, any predecessor or successor thereto, the Treaty specifically requires that all such dividend provisions, whether written or claimed to be implied, are amended by substitution of the following:

Dividends. Any dividend paid on this policy shall be as declared in the sole and absolute discretion of Protective and no contractual provisions or written or oral promise, express or implied, heretofore made to the policyholder shall

bind Protective to declare or pay any dividend. Protective may, at its sole option, declare no dividend or a dividend in such amount as it may deem advisable.

And furthermore it is required that the policyholder acknowledge that by failure to reject the assumption certificates he releases Protective from any claims, whether sounding in fraud, misrepresentation or otherwise, which might have heretofore been made by him or on his behalf relating to any dividend with respect to the policy. All premiums falling due subsequent to _____ shall be paid to, and all correspondence relating to this policy should be directed to, Protective Life Insurance Company at its home office in Birmingham, Alabama.

Protective shall have the right to terminate the Treaty and void this assumption certificate if enjoined by court order or if, within six (6) months of the approval of the Treaty, an appeal is taken against any order of the court which approved the Treaty or any lawsuit attacks the Treaty or its validity.

The policyholder may reject this assumption by filing such rejection in writing at the office of John G. Bookout, Receiver, Department of Insurance, Administration Building, Montgomery, Alabama 36104, within sixty (60) days after this assumption certificate was mailed. As a consequence of such rejection, this assumption shall be void and the policyholder will retain his rights against the receivership estate of Empire Life Insurance Company of America.

IN WITNESS WHEREOF, Protective Life Insurance Company has caused this certificate to be executed in its name and on its behalf by William J. Rushton, III, its President, and

attested by W. C. Brannon, its Secretary, both being thereunto duly authorized.

ATTEST:
W. C. Brannon
Secretary

PROTECTIVE LIFE INSURANCE COMPANY
By Wm. J. Rushton
President

FIRST AMENDMENT TO TREATY OF ASSUMPTION AND BULK REINSURANCE

John G. Bookout, Commissioner of Insurance, State of Alabama (herein the "Receiver"), in his capacity as Receiver of Empire Life Insurance Company of America, an Alabama corporation, in receivership (herein "Empire"), and Protective Life Insurance Company, Birmingham, Alabama, an Alabama corporation (herein "Protective"), hereby amend the Treaty of Assumption and Bulk Reinsurance between them dated as of May 31, 1974, as follows:

1. The provisions of Paragraph III are hereby stricken and the following provisions are substituted therefor:

The Closing Date of this Agreement shall be June 1, 1974 unless such Date be hereafter extended in writing by Protective.

This Agreement shall not become effective or be binding on Protective in any way unless and until the Receiver shall have accomplished (1) the tender or furnishing of each and every item enumerated in Paragraphs VII D and XVIII hereof within the time limits therein specified as amended and (2) the transfer and assignment to Protective of all of the assets (or cash in lieu of assets) required to be transferred to Protective hereunder on or before the Closing Date. If the Receiver shall fail to have completely accomplished either (1) or (2) within said time limits, this Agreement shall never become effective and shall be totally null and void. Upon the Receiver's completely accomplishing both (1) and (2), this Agreement shall be effective as of

12:01 A.M., C.S.T. on January 1, 1974, which shall be deemed to be the Effective Date of this Agreement.

However, it is expressly agreed by the Receiver and Protective that during the period between the date upon which this Agreement is approved by the Court and the Closing Date, Protective, to the extent practicable, shall administer the affairs of Empire, invest such investable assets that are transferred to it prior to the Closing Date and otherwise be empowered to act as if the Agreement was closed except as to the provisions of Paragraph XIII, and all actions taken by it in good faith shall be binding on the Receiver in the event this Agreement does not become effective.

2. Paragraph VII A at line 5 on page 14 is amended by striking the words "fifteen year period" and substituting therefor the words "ten year period." Paragraph VIII D (3), line two, is amended by striking the words "fifteen (15) years" and substituting therefor the words "ten (10) years."

3. The provision at the end of Paragraph VII C (5) beginning with the words "and the Receiver further . . ." in the middle of the fourth line from the end of Paragraph VII C (5) on page 17 of the Agreement and ending with the words "under all such policies" at the end of Paragraph VII C (5) is stricken.

4. Paragraph VII is amended by adding the following as subparagraph D:

D. *Life Insurance*

1. On or before the Closing Date, the Receiver shall transfer possession of each of the insurance policies described in Paragraph VII C (5) above to Protective and shall assign to

Protective absolutely and irrevocably the right to receive death proceeds from such policies in the amount of $4,350,000 subject only to adjustment as provided in subparagraph D (3) below. Notwithstanding said transfer of possession of the policies, the Receiver shall remain the owner and beneficiary of said policies. Not less than 15 days prior to the Closing Date, the Receiver shall have accomplished all things necessary to: (1) make such assignments of proceeds to Protective in a form and with content acceptable to the issuer of said policies; (2) receive written acknowledgments from the issuer of notice of assignment; (3) provide for the absolute right by Protective to pay upon non-payment by the Receiver, prior to cancellation of any of such policies, the premiums of any and all of such policies upon written notice by the issuer that the Receiver has failed to pay any such premium; and (4) furnish satisfactory written evidence to Protective of having accomplished (1), (2) and (3).

2. Protective shall have first priority to any and all death proceeds paid under such policies up to the amount of said proceeds assigned to Protective. Should, for any reason, the death proceeds paid under said policies be less than the full face amount of said policies, nevertheless, Protective shall be entitled to and shall receive the whole amount of proceeds assigned hereunder (as may be adjusted) and there shall be no pro rata reduction of the proceeds payable to Protective on account of any failure to pay the entire proceeds of said policies.

3. On or before June 1 of each calendar year after 1974, the Receiver and Protective shall adjust the amount of the assignment of proceeds of said policies made hereunder so

that such assignment equals the then current value of the interest of Protective in the Libbie Shearn Moody Trust assigned hereunder as reflected in Protective's annual statement for the preceding year filed with the Alabama Department of Insurance plus any retained risk amount by Protective under said policies either as a result of assumption or as a reinsurer.

4. The Receiver shall pay all premiums on such policies and do all things necessary to keep each of said policies in full force and effect at all times. Upon a written statement from the Receiver, Protective shall reimburse the Receiver annually for Protecti's pro rata share of such premiums based upon the ratio of death proceeds assigned to Protective to the total death benefits payable under such policies for such year.

5. If Protective, upon non-payment by the Receiver, pays the premiums on any of said policies, the Receiver shall immediately, free of any further consideration, transfer and assign all of said policies to Protective, free and clear.

6. The Receiver agrees to do all things reasonably within his power to obtain agreement of the National Western Life Insurance Company of Denver, Colorado and of the North America Life Insurance Company of Houston, Texas so that Protective may directly assume the interests of said companies in such policies and acquire from North America all of its rights under treaties of reinsurance relating to such policies between North America and Connecticut General Life Insurance Company and Lincoln National Life Insurance Company.

7. Receiver agrees that should he or the Court decide to

reduce or terminate the Receiver's interest in such insurance policies, he shall offer to assign and transfer to Protective free of any further consideration such interest in such policies as both owner and beneficiary as the Receiver or the Court determines should be relinquished and if Protective accepts such offer of transfer, Protective shall thereafter be responsible for all premiums on such policies. It is recognized that any decision by Protective with respect to such additional insurance shall be at its sole discretion, and Protective shall become the sole owner of and be named the sole beneficiary under any such part of insurance assigned. The Receiver shall not assign his interest either as owner or beneficiary in any said policies to any third party. Upon termination of the Receivership, the Receiver, upon the election of Protective in its sole discretion, shall transfer, assign and convey his entire interest as both owner and beneficiary of each of said policies to Protective free of any further consideration from Protective to the Receiver. Protective shall thereafter have sole discretion with respect to all matters concerning said policies, including, without limitation, the cancellation or reduction of benefits under said policies but shall also be responsible for all premiums on such policies.

8. No part of this amendment shall diminish the right of Protective under Paragraph XI D (2) to charge any and all premiums paid by Protective on such insurance as an investment expense of Empire. And benefits received under such policies by Protective shall be treated as assets added to the Empire Fund, or as Protective assets if the moratorium created hereunder has expired.

5. Paragraph VII is amended further by adding the following as subparagraph E:

E. The Receiver shall transfer, assign, deliver and convey to Protective all of the assets to be transferred hereunder on or before the Closing Date, provided that to the extent that the Receiver is, for reasons beyond his power and control, not able to transfer and assign title to one or more of such assets he shall, in lieu of any such asset, pay to Protective on the closing Date such amount of cash as shall equal the value of any and all assets not transferred as any such asset or assets are valued pursuant to the provisions of Paragraph VII C hereof. Said cash shall be held by Protective in escrow, but upon the Receiver transferring any asset not transferred at closing to Protective within two years from the Closing Date, Protective shall repay the Receiver such amount of said escrow funds as shall equal the value (as determined under Paragraph VII C) of any such asset transferred. Upon the expiration of two years from the Closing Date, any and all such funds in escrow shall vest in Protective absolutely and thereafter it shall have all right, title and interest thereto, and the Receiver shall have no further obligation to transfer the assets whose value is represented by such escrow.

6. Paragraph VIII D (1), line two, is amended by striking the words "one hundred five percent (105%)" and substituting therefor the words "one hundred eight percent (108%)," and Paragraph VIII D (1), line nine, is amended by striking the words "one hundred two percent (102%)" and substituting therefor the words "one hundred five percent (105%)."

7. The term "Effective Date" is amended to read "Closing

Date" in the second line of Paragraph XIII and wherever it appears in Paragraph XVIII.

8. Paragraph XVIII(e) (p. 43) is stricken in its entirety. The last three lines of Paragraph XVIII(g) beginning with the words, "and forms with . . ." are stricken in their entirety.

9. Paragraph XIX A shall be stricken in its entirety and in place of said provision the following shall be added:

A. The parties recognize that this Agreement will be executed pursuant to an Order of the Court in the case of *State of Alabama ex rel John G. Bookout, Comm'r v. Empire Life Insurance Co.*, Case No. 171-687 in the Circuit Court for the Tenth Judicial Circuit of Alabama, In Equity, and the Receiver cannot guarantee that the validity of this Agreement, in whole or in part, or any order in Case No. 171-687 relating to this Agreement may not be made an issue either in further proceedings in said case, including an appeal, or in other legal proceedings presently pending or hereafter to be filed.

The Receiver is unwilling to condition this Agreement on there being no such appeal or collateral proceeding, but hereby agrees to and shall reimburse Protective from the fund created for the Receiver in Article VII hereof for all expenses, including attorneys' fees up to a maximum of $15,000 without Court approval and for such amounts in excess of $15,000 as the Receiver and the Court shall approve, which Protective might incur on or after December 5, 1973 as a result of the protection of its interests, or in cooperation with the Receiver in protecting their joint interests, in Case No. 171-687 or in any appeal of Case No. 171-687 (whether or not Protective be a party thereto) or in any collateral legal proceeding

affecting (i) this Agreement, (ii) any order in Case No. 171-687 or (iii) otherwise affecting the affairs of Empire to which Protective may be a party or, if not a party, have an interest therein.

The Receiver and Protective agree to cooperate in any legal proceeding in which their interests may be aligned relating to this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed as of this 31st day of May, 1974.

John G. Bookout, Commissioner of Insurance,
State of Alabama, as Receiver for Empire Life
Insurance Company of America.

ATTEST:
Wm. C. Brannon
Secretary

PROTECTIVE LIFE INSURANCE COMPANY
Wm. J. Rushton
President

SECOND AMENDMENT TO TREATY OF ASSUMPTION AND BULK REINSURANCE

JOHN G. BOOKOUT, Commissioner of Insurance, State of Alabama (herein the "Receiver"), in his capacity as Receiver of Empire Life Insurance Company of America, an Alabama corporation, in receivership (herein "Empire"), and PROTECTIVE LIFE INSURANCE COMPANY, Birmingham, Alabama, an Alabama corporation (herein "Protective"), hereby amend the Treaty of Assumption and Bulk Reinsurance between them dated as of May 31, 1974 ("Agreement"), as follows:

Recitals

1. Since Protective submitted the Agreement for acceptance by the Receiver, material developments have occurred with respect to Empire. Specifically, but without limitation, the assignability of Empire's interest in the Libbie Shearn Moody Trust has been questioned in a lawsuit filed by Shearn Moody, Jr. against The Moody National Bank and Empire in the District Court of Galveston County, Texas, and the hearing in the Circuit Court for the Tenth Judicial Circuit of Alabama for approval of liquidation of Empire as recommended by the Receiver and for acceptance of the Agreement, originally set for February 13, 1974, has been postponed until April 8, 1974, pending notification by mail of each Empire stockholder of the hearing. Protective offered the Agreement on the express condition that it be accepted by the Receiver and approved by the Court on or before January 31, 1974, and it is now apparent that such acceptance and approval cannot occur until after the hearing to be held April 8, 1974.

2. Protective desires to extend the time in which such acceptance and approval may be made through June 1, 1974, but only if the Receiver will agree to make appropriate adjustments in the initial Moratorium Amount established in Section VIII of the Agreement if it is determined that events transpiring since January 31, 1974 have adversely affected the condition of Empire and if the Receiver will enter into the agreements expressed herein.

3. In Section VI of the Agreement, Protective agreed to reinsure the Old National Policies subject to mutual agreement on the terms of such reinsurance. Since submitting the Agreement, the Receiver has insisted that the initial Moratorium Amount with respect to each Old National Policy to be reinsured be determined on the same basis as that of the Empire Policies to be reinsured. The value of assets to be transferred to Protective for the reinsurance of the Old National Policies and the reserves which must be established for such policies have not been determined by the parties, and the Receiver can make no warranty or assurance at this time that sufficient assets can be transferred from Old National to justify an initial Moratorium Amount for the Old National Policies equal to that of the Empire Policies. The parties therefore desire to make clear that some upward adjustment in the initial Moratorium Amount for all Assumed Policies may have to be made if Protective is to reinsure the Old National Policies with an initial Moratorium Amount equal to that of the Empire Policies.

Agreement

NOW, THEREFORE, in consideration of the premises and the respective agreements of the Receiver and Protective herein contained, they hereby agree as follows:

1. The date for acceptance and approval of the Agreement as provided in Section II, p. 2 of the Agreement is extended to and through, but not beyond, June 1, 1974.

2. Immediately upon the acceptance of the Agreement, as amended, by the Receiver and its approval by the Court, but prior to the Effective Date, the Receiver shall transfer to Protective and Protective, as agent of the Receiver, shall assume possession and control of, and dominion over, all of the assets of Empire other than the Receiver's fund created in Section VII of the Agreement. Thereafter, Protective may, on behalf of the Receiver, sell dispose of, transfer, assign, invest, reinvest, and otherwise manage any and all of said assets, subject only to such restrictions as may be placed upon Protective by the Court by written order. The Receiver shall do all things necessary or desirable to accommodate Protective's administration of said assets hereunder. Said assets, while in the possesion and control of Protective prior to the Effective Date shall not constitute a trust fund and shall not be subject to any laws, rules or restrictions which apply to investment of trust funds. It is expressly agreed that no claim of whatsoever kind will be made against Protective for alleged errors in judgment made in good faith in the management, sale, disposition, and reinvestment of said assets.

It is recognized by the Receiver that the interests of Empire will be best served by allowing Protective to commingle cash and equivalents received upon initial transfer to Protective of Empire assets or from the sale or transfer of Empire assets or from income produced by such assets or policies into fixed income investments (bonds, preferred stock, mortgages and similar investments) made by Protective in the management of its

own funds. Therefore, the Receiver hereby requests and authorizes Protective to commingle such cash and equivalents into Protective's fixed income investments and invest same in the same manner as Protective invests its own funds without segregating Empire's share from that of Protective. The value of Empire's share in such investments made with commingled funds shall be determined as provided in Section IX.B of the Agreement. Should Protective re-transfer Empire assets to the Receiver as provided for herein, the value of Empire's share in such commingled assets shall be computed as provided in Section IX.B and Protective shall re-transfer to Empire cash and/or fixed income assets (valued at their admitted value to Protective) purchased after transfer of the Empire assets hereunder, selected by Protective in its discretion, equal to the value of Empire's share so computed. Any dispute under the provisions of this paragraph shall be resolved by arbitration as provided in Section XVII of the Agreement.

3. Protective shall assume possession and control of and dominion over all Assumed Policies and, without reinsurance, shall administer all Assumed Policies. Such administration shall be carried out as if the Agreement were fully effective, subject to such modifications as the Court may prescribe, except that Protective shall reinsure no such policy and all payments on such policies shall be as if the Moratorium provisions of the Agreement required an initial Moratorium Amount based on 50% of the Withdrawable Funds of the policies as of September 15, 1972 rather than the 35% of the Withdrawable Funds as of the Effective Date. It is further agreed that unless paragraph 6 of this Second Amendment becomes effective, the initial Moratorium Amount of any Assumed Policy under the Agreement

shall not exceed fifty per cent (50%) of the Withdrawable Funds as of September 15, 1972.

4. To facilitate transfer of said possession, control and dominion under paragraphs 2 and 3 hereof, the Receiver shall transfer such of Empire's documents, records and other papers to Protective's offices in Birmingham, Alabama as Protective shall request. Protective shall at all times maintain appropriate books, records and ledgers with respect to said assets and policies, which shall be open to inspection of the Receiver or the Court and their representatives at any reasonable time.

Protective shall be empowered to change any and all procedures and records (including, without limitation, those relating to data processing) now in use by Empire as Protective, in its sole discretion, shall deem advisable.

The Receiver shall pay to Protective annually a fee for such administration prior to the Effective Date of the Agreement which (regardless of whether the Agreement otherwise becomes effective) shall be equal to the amount provided Protective after the Agreement becomes effective as set forth in Sections XI.B.5 and 6 and in Section XI.D to the extent the expenses specified in Sections XI.B.6 and XI.D.1 and 2 are not directly paid out of Empire funds.

5. Except as provided in the first four paragraphs of this Second Amendment, all of Protective's obligations under the Agreement as amended are expressly conditioned upon the determination by Protective that Empire's entire interest in the Libbie Shearn Moody Trust, as described in the Agreement, may be validly, lawfully and irrevocably assigned to Protective free and clear of any lawful or equitable claim or restriction. In

making such determination, Protective may rely exclusively on the opinion of its General Counsel, Cabaniss, Johnston, Gardner, Dumas & O'Neal. Upon such determination made by Protective in writing and delivered to the Receiver and upon the satisfaction in full of all other conditions to the Agreement as twice amended, all of Protective's other obligations under the Agreement shall forthwith become effective.

6. Except as provided in the first four paragraphs of this Second Amendment, prior to any of Protective's obligations under the Agreement as amended becoming effective and binding, Protective and the Receiver shall evaluate changes in the condition of Empire occurring after February 1, 1974, including, without limitation, lapses in premium-paying policies and any changes in the value or nature of Empire assets. If for any reason the condition of Empire has changed adversely from such date so as to justify an increase in the Moratorium Amount, Protective and the Receiver shall endeavor in all good faith to agree on the amount of such increase. If Protective and the Receiver fail to agree either that Empire's condition has changed adversely or on the amount the Moratorium Amount shall be increased, any such dispute shall be submitted to binding arbitration in accordance with the provisions of Section XVII of the Agreement. It is expressly understood that nothing herein is intended to or shall result in reduction of the Moratorium Amount.

7. Except as provided in the first four paragraphs of this Second Amendment, prior to any of Protective's obligations under the Agreement as amended becoming effective and binding, Protective and the Receiver shall determine as accurately as then possible the value of assets transferred or to be

transferred from Old National to Protective with respect to the reinsurance of the Old National Policies and the Empire Liabilities, as defined in Section X of the Agreement, on account of such policies. If the fair market value of the assets is insufficient in light of these liabilities on the Old National Policies to provide an initial Moratorium Amount consistent with that established for the Empire Policies, then Protective and the Receiver in all good faith shall seek to agree upon an appropriate increase in the initial Moratorium Amount for all Assumed Policies. If Protective and the Receiver fail to agree either that the value of the assets to be transferred is insufficient for reinsurance of the Old National Policies on the basis of such initial Moratorium Amount or, after such determination of insufficiency of value of assets, upon an appropriate increase in the initial Moratorium Amount, such dispute shall be submitted to binding arbitration in accordance with the provisions of Section XVII of the Agreement. It is expressly understood that nothing herein is intended to or shall result in a reduction in the initial Moratorium Amount as provided in Section VIII.A of the Agreement.

8. The Effective Date, which was set as January 1, 1974 in the first amendment, shall be redetermined by mutual agreement of the Receiver and Protective to reflect the date on which all the conditions set forth in the Agreement, the first amendment and this amendment are fully met. If all such conditions, including, without limitation, the condition stated in paragraph 5 of this Second Amendment, are not fully met by March 1, 1975, Protective may, at its sole option, terminate this Agreement effective forthwith and, upon ninety (90) days' written notice to the Receiver, re-transfer posession and control of all Empire

assets and Policies transferred to Protective, in which case all the terms and conditions of the Agreement shall forthwith be void and of no effect whatsover, it being understood that the fee payable to Protective for administration shall be paid during such ninety day period. If all of such conditions are met prior to March 1, 1975 and if Protectice and the Receiver shall fail to agree upon a revised Effective Date, such dispute shall be submitted to binding arbitration in accordance with the provisions of Section XVII of the Agreement.

I NWITNESS WHEREOF, the parties hereto have caused this instrument to be executed as of this 31st day of May, 1974.

JOHN G. BOOKOUT
John G. Bookout, Commissioner of Insurance,
State of Alabama, as Receiver for Empire Life
Insurance Company of America.

ATTEST:
W. C. BRANNON
Secretary

PROTECTIVE LIFE INSURANCE COMPANY
By WM. J. RUSHTON III
Its President

Executed in 3 Counterparts of which this is Counterpart No. 2

THIRD AMENDMENT TO TREATY OF ASSUMPTION AND BULK REINSURANCE

JOHN G. BOOKOUT, Commissioner of Insurance, State of Alabama, in his capacity as Receiver of Empire Life Insurance Company of America, an Alabama corporation, in receivership, and PROTECTIVE LIFE INSURANCE COMPANY, Birmingham, Alabama, an Alabama corporation, hereby amend the Treaty of Assumption and Bulk Reinsurance between them dated as of May 31, 1974, as follows:

1. The time for acceptance and execution of this Treaty by the Receiver is hereby extended to and through June 24, 1974.

2. It is agreed that this Treaty and each of the three amendments thereto shall be executed in three counterparts, each of which shall be deemed an original.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed as of May 31, 1974.

JOHN G. BOOKOUT
John G. Bookout, Commissioner of Insurance,
State of Alabama, as Receiver for Empire Life
Insurance Company of America.

ATTEST:
W. C. BRANNON
Secretary

PROTECTIVE LIFE INSURANCE COMPANY
By WM. J. RUSHTON III
Its President

FOURTH AMENDMENT TO TREATY OF ASSUMPTION AND BULK REINSURANCE

JOHN G. BOOKOUT, Commissioner of Insurance, State of Alabama (herein the "Receiver"), in his capacity as Receiver of Empire Life Insurance Company of America, an Alabama corporation, in receivership (herein "Empire"), and PROTECTIVE LIFE INSURANCE COMPANY, Birmingham, Alabama, an Alabama corporation (herein "Protective"), hereby amend the Treaty of Assumption and Bulk Reinsurance between them dated as of May 31, 1974 ("Agreement"), as follows:

Recitals

Under the provisions of Section VII of the Agreement, the Receiver agreed, on behalf of Empire, to convey to Protective "all assets" of Empire. Included among the "assets" are certain rights of action on behalf of Empire against its former officers, directors, agents, and parties acting in concert with them, for fraud, deceit, mismanagement or other misconduct. Notwithstanding said provision, it has been agreed between the parties that the Receiver shall prosecute any such right of action, including, without limitation, any and all claims made on behalf of Empire in the consolidated actions of Meyers, Haines and Bookout v. Moody, et al., presently pending in the United States District Court for the Northern District of Texas (CA Nos. 3-5678 and 3-7625-D). Although the Receiver will prosecute any such action, the parties have agreed that any Recovery (defined below) in any such Action (defined below) should rightfully and equitably be applied first to the benefit of the Empire policyholders by payment of the net of any such Recovery (defined below), in whole or in part, as provided

herein to Protective for reduction or elimination of the Moratorium Amounts established under the Agreement. It has been further agreed (1) that after payment to Protective of the Policyholder Amount (defined below), the Receiver may retain any excess, and (2) that a pro rata adjustment of the amount to be paid to Protective may be made (based on the Policyholder Amount) if necessary to prevent unlawful discrimination against non-policyholder creditors of Empire asserting valid and recognized claims.

NOW, THEREFORE, in consideration of the premises, and the mutual covenants herein contained, the undersigned parties hereby amend the Agreement and covenant and agree as follows:

1. As used herein, "Recovery" shall mean any net receipt of assets of any kind, including, without limitation, cash, by way of settlement, judgment, or otherwise, by the Receiver, any ancillary receiver, Empire, or any other person or entity for the benefit of Empire, resulting from any action filed or claim against any former officer, director, or agent of Empire, or any person or entity acting in conspiracy or concert therewith. As used herein, "Action" shall mean any action from which a "Recovery" results, including, without limitation, the consolidated actions referred to above. "Policyholder Amount" shall mean the greater of (a) the total of all Moratorium Amounts as computed under the terms of the Agreement or (b) the difference between the Empire Liabilities (excluding any adjustments for Moratorium Amounts) and the Empire Fund less (c) 120% of one year's annual premium income on all Empire Policies in force thirty days prior to payment of any Recovery to Protective.

2. The Receiver shall pay to Protective for the benefit of

the Empire policyholders and for credit to the Empire Fund for reduction of Moratorium Amounts the entire net amount of any Recovery, provided that (a) such payment shall not inequitably discriminate (based on the total of the Moratorium Amounts) against non-policyholder creditors of Empire asserting valid and recognized claims, and (b) subject to paragraph 3 hereof, such payment shall not exceed the Policyholder Amount. Any amount of Recovery which exceeds the Policyholder Amount may be retained by the Receiver for the benefit of shareholders and other claimants.

3. Notwithstanding the proviso contained in paragraph 2(b) above, if at the time of payment Protective has voluntarily reduced any Moratorium Amounts, or if such amounts are cancelled under the Agreement as a result of the expiration of ten years after the Effective Date, then the Receiver shall pay to Protective from any net Recovery the amount of any such voluntary reduction or cancellation of the Moratorium Amounts. In the case of any partial voluntary reduction of Moratorium Amounts, such payment shall equal the total of the amount of the voluntary reduction plus the Policyholder Amount.

4. The Receiver shall not enter into, nor shall he authorize any settlement of any Action without first having obtained the approval of such settlement by Protective, which approval may not be unreasonably withheld. The Receiver shall not initiate, or participate in negotiations toward settlement of any such Action without advising Protective of such negotiations and giving Protective an opportunity to attend and participate in such negotiations and all meetings pertaining thereto. The Receiver shall keep Protective advised of all material hearings in any Action.

5. This agreement is conditioned upon the reinsurance and assumption of liability on policies of insurance by Protective pursuant to the Agreement as amended.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed as of May 31, 1974.

JOHN G. BOOKOUT,
John G. Bookout, Commissioner of Insurance,
State of Alabama, as Receiver for Empire Life
Insurance Company of America.

ATTEST:
W. C. BRANNON
Secretary

PROTECTIVE LIFE INSURANCE COMPANY
By WM. J. RUSHTON III
Its President

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-873

SHEARN MOODY, JR. and JOHN S. BLEKER,
Petitioners,

vs.

THE STATE OF TEXAS, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE TENTH SUPREME JUDICIAL DISTRICT OF TEXAS

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INTRODUCTION

The petition presently before this Court is still another effort by Shearn Moody, Jr. to undo the liquidation of the Empire Life Insurance Company of America and the reinsurance of its insurance policies by respondent, Protective Life Insurance Company. The efforts of petitioner, Shearn Moody, Jr., to prevent the liquidation and reinsurance of Empire have produced a virtually never-ending stream of litigation. They have resulted in findings of civil and criminal contempt against Moody. *See Ex parte*

Shearn Moody, Jr., 351 So. 2d 538 (1977) (criminal contempt); *Moody v. State ex rel. Payne*, 351 So. 2d 547 (1977) (civil contempt). The efforts have uniformly been unsuccessful. Citations of some of the reported decisions in this litigation appear below:

Moody v. State, ex rel. Payne, 295 Ala. 299, 329 So. 2d 73 (1976);

Moody v. State, ex rel. Payne, 344 So.2d 160 (1977);

Moody v. State, 520 S.W.2d 452 (Tex.Civ.App.-Austin 1975);

Empire Life Ins. Co. v. State, 492 S.W.2d 366 (Tex.Civ. App.-Austin 1973);

Moody v. Crook, 520 S.W.2d 958 (Tex.Civ.App.-Austin 1975);

Moody v. Jones, 519 S.W.2d 536 (Tex.Civ.App-Austin 1975);

Day v. State, 489 S.W.2d 368 (Tex.Civ.App.-Austin 1972, n.r.e);[1]

Moody v. Moody Nat'l Bank, 522 S.W.2d 710 (Tex.Civ. App.-Galveston 1975, n.r.e.);

Moody v. Texas, 538 S.W.2d 158 (Tex.Civ.App.-Waco 1976, writ ref'd n.r.e. 1977).

This is the fourth petition for a writ of certiorari from this Court sought by Moody relating to Empire.[2] He is joined in this

[1] Indicates denial of review by the Texas Supreme Court upon a finding of "no reversible error" (n.r.e.).

[2] Previous petitions have been denied in:
Ex parte Shearn Moody, Jr., No. 76-1845, *cert. denied* 10/3/77, *rehearing denied* 11/28/77;
Shearn Moody, Jr. v. Texas, No. 77-571, *cert. denied*, 12/5/77;
Shearn Moody, Jr. v. State of Alabama ex rel. Payne, No. 77-428, *cert. denied* 12/12/77.

petition by his first cousin, Shearn Bleker, who intervened in the proceedings below. The three previous petitions have all been denied by this Court.

This petition seeks review of proceedings in the District Court of Travis County, Texas, which court appointed an ancillary receiver in Texas to assert jurisdiction over Empire's assets which were located in Texas when the main receivership proceeding was commenced in Alabama.

As this Court will recall from its consideration of Moody's petition in *Moody v. State of Alabama, et al.*, No. 77-428, following a ten-day evidentiary hearing, on June 14, 1975, the Alabama or main receivership court ordered the liquidation of Empire and the reinsurance of its policies with Protective pursuant to a reinsurance treaty filed with the court by Protective. The Alabama Supreme Court affirmed, and this Court denied certiorari on December 12, 1977.

At the time of the June 14, 1975 order, most of Empire's assets were under the jurisdiction of the Texas ancillary receiver. Following the approval of the Protective treaty by the main receivership court, the Texas ancillary receiver applied for an order from the court below authorizing him to transfer the Empire assets under his jurisdiction to the Alabama receiver so they could be transferred to Protective in accordance with the terms and provisions of Protective's reinsurance treaty. A second ten-day hearing commenced in Texas at which Moody was represented by six lawyers and, following the hearing, the trial court entered an order authorizing the ancillary receiver to transfer those assets to Protective. The Texas Court of Appeals affirmed. *Moody v. State*, 538 S.W.2d 158 (Ct.Civ.App.-Waco 1976). The Supreme Court of Texas denied Moody's petition for a writ of certiorari, finding no reversible error in the proceedings. Moody now seeks a writ of certiorari from this Court.

A large part of petitioners' brief is merely a reprint of unmeritorious arguments previously made by Moody in his previous petition in Case No. 77-428. The balance of the arguments, as we show in this brief, are wholly without merit.

STATEMENT OF THE CASE

1. The Petitioners

Moody is a former chief executive officer and controlling stockholder of Empire. Bleker is Moody's first cousin and owns a $5,000 policy and 300 shares of Empire common stock (R. 1155-56, 1161, 1199, 606-608; Rec. Exhs. 19, 19A).

2. Events Leading to the Reinsurance Treaty

Empire became an Alabama company in one of numerous mergers engineered by Moody (R. 260). In 1968 an examination of Empire's financial condition was initiated by numerous representatives of affected insurance departments (R. 1205). The examination was recessed and renewed in 1969, but was not finally completed until 1971 (R. 1207-1208). The reason for the delays and recesses was to allow Empire time to work out problems regarding its solvency (R. 1216-1218). The examination reported that Empire was insolvent in excess of $6,000,000 (Receiver's Exhs. 19 and 19A). On June 29, 1972, the Commissioner of Insurance of the State of Alabama sought and obtained an order from the Alabama court appointing a receiver for Empire (R. 28). As Empire had been made an Alabama corporation by Moody, the receivership proceeding in Alabama became the domiciliary or main receivership proceeding. Thereafter, the court below, the District Court of Travis County, Texas, appointed Tom McFarling, the Texas statutory liquidator, temporary ancillary receiver of Empire to safeguard assets

of Empire in Texas (R. 28). Other ancillary receivership proceedings were commenced in the States of Arkansas and Montana (R. 1738).

Because Empire was insolvent in excess of $6,000,000, court orders in the Alabama and Texas receivership proceedings placed restrictions on the payment of policyholders benefits. Specifically the courts ordered that the receiver pay to policyholders only 50% of the cash values of Empire policies which could be withdrawn voluntarily prior to death. This prevented a "run on the bank" and bought time for the receivers to seek a solution to Empire's insolvency (R. 282-283). Initially, pursuant to the order of the Alabama receivership court, the Alabama receiver sought to "rehabilitate" Empire with a view toward ultimately eliminating the company's insolvency and terminating the receivership (R. 28). After more than a year of study and efforts at rehabilitation, the Insurance Commissioners of the States of Alabama, Arkansas, Montana, Nebraska, North Dakota, Oklahoma, and Texas, met in Helena, Montana, on August 29, 1973, to consider whether efforts at rehabilitation should continue or whether the domiciliary receiver should seek to reinsure Empire's policies with a solvent company and liquidate Empire (R. 30, Rec. Exh. 1). The commissioners determined unanimously that further efforts at rehabilitation would be hazardous to Empire's policyholders and resolved that the Alabama receiver advertise for solvent insurance companies to submit reinsurance proposals (Rec. Exh. 1). The Alabama receiver then sought and received approval from the domiciliary receivership court to solicit reinsurance proposals for Empire. Three formal bids—from Protective, Banker's Union Life Insurance Company and Mutual Savings Life Insurance Company —were received. In addition, Moody and others presented plans for rehabilitation (R. 31-35).

Following receipt of the bids, the Texas ancillary receiver hired an eminently qualified and fully independent actuary and

reinsurance specialist from San Francisco, California, Dr. A. C. Olshen, to study the bids and recommend which one, if any, should be accepted by the domiciliary receiver (R. 35-36, 293-297, Rec. Exh. 13). Dr. Olshen studied the proposals in depth and collected and analyzed voluminous data on Empire, its policies and financial condition (R. 299, 321, 362, Rec. Exh. 7). Thereafter, the insurance commissioners met with Dr. Olshen and discussed each bid with the representatives of the respective companies. Following this session, the six insurance commissioners and Dr. Olshen unanimously recommended that the Protective proposal be accepted provided that Protective agree to certain amendments to provide policyholders greater protection. Each of these amendments was negotiated with Protective and incorporated into the Treaty (R. 38-39).

3. **The Necessity for a Reinsurance Treaty; the Protective Treaty.**

Because of the tremendous asset deficiency of Empire, the responsible insurance commissioners were faced with four alternatives.

First, the Empire stockholders could pay in cash or contribute liquid assets to put Empire in an acceptable asset position. The commissioners officially made this offer in the resolution adopted in Helena in 1973, by stating:

> The principal stockholder or stockholders may by depositing with the Receivership Court sufficient funds and by naming management acceptable to the Commissioners, Superintendents and Courts, rehabilitate the company at any time prior to the date of final hearing.
>
> Receiver's Exh. 8, p.2.

The Commissioners had been in constant contact with Empire since 1969 and this option had always been open to Moody (R. 38, 1137-1187). Therefore, for a period of four years, and

indeed, up to and through the hearing in the instant case, a period of six years, Moody never offered to inject additional capital to restore Empire to solvency (*Id.*).

Second, the Commissioners could simply nurse Empire along and continue to accept premiums from unsuspecting policyholders, knowing that the time would probably come when the company could not pay policy benefits. In spite of one of Moody's witness' recommendation of this course, another testified that only an injection of outside capital could save Empire (R. 654). This course also would cause the position of Empire to further deteriorate thus diminishing or eliminating the chance of obtaining reinsurance. The dangers of this course to the policyholders made its continuation unthinkable (R. 414, 1757-1759; Bench Comments, p. 2).

Third, the Commissioners could simply liquidate Empire. Liquidation would increase the already existing asset deficiency because Empire's assets would bring less on liquidation than they were carried on the company's books. (R. 1761). Based on estimates of liquidation values, the Ancillary Receiver estimated a loss of an additional approximately $8,500,000 in the event of liquidation without reinsurance (R. 62-64). Straight liquidation without reinsurance also would have totally deprived the policyholders of benefits under their policies. Those policyholders who had passed insurable age or suffered health problems would have been uninsurable and would not have even recovered their full cash value. Those persons who had, in reliance on the receivership court's protection, paid premiums after the date of receivership would not even obtain 100% return of their premiums paid since that date. Therefore, those persons who had paid some $6,000,000 in premiums during receivership would not have gotten their money back.

The fourth, and the only practical alternative, was to seek reinsurance with a responsible company in order to protect the policyholders.

A reinsurance treaty is a contract whereby one insurance company assumes and accepts the insurance policies of another company. Because the reinsuring company becomes liable on these policies and is required by statute to create reserve liabilities for the policies, the company ceding the policies must convey assets to the reinsuring company to offset the reserve liabilities. Empire, however, was insolvent and could not transfer assets equal in value to the reserve liabilities on its policies. Thus, in order for a company to reinsure Empire's policies without sustaining a loss, a contractual limitation had to be placed on some of the policy benefits thereby reducing the reserve liabilities on the policies.

The reason for reinsuring Empire's policies was to obtain a guarantee from a financially responsible company that full policy benefits would be paid at maturity and that withdrawable cash values would be fully restored to the Empire policyholders in the future. During the period of the receivership, policyholders have been paying approximately $3,000,000 in premiums annually to the receiver (Def. Exhs. 22-23). The receiver, though receiving these premiums, was in no position to assure that the policyholders would ultimately receive the benefits for which they were paying. In fact, it became apparent during the course of the receivership that instead of improving, Empire's condition was rapidly deteriorating, creating an even greater hazard to policyholders than existed when the company was initially placed in receivership (R. 414, 1757-1759). *Even Moody's own expert witness acknowledged that unless outside capital was put in the company, which Moody refused to do, the company could not be rehabilitated* (R. 654). Thus, the insurance commissioners and receivers determined that they must try to procure a written guarantee from a financially responsible company that all policyholder benefits would ultimately be restored (Rec. Exh. 1).

After a full hearing of all of the evidence, Judge Jones became convinced that this was the only prudent alternative. He specifically stated from the bench following the trial:

> [One alternative is] for the receiver to do nothing and for this court to do nothing but let it ride and see if some dear, dim, distant day in the future it will all work out.
>
> . . . I am going to say with whatever certainty and conviction I have, I am not going to preside over such an operation and receive a couple of million dollars a year from unknowing policyholders and in the hope that it might sometime work out. I think that is highly irresponsible. I think that suggestion is not worthy of much consideration, because if it does not work out, certainly the receivers have no resources by which they could make anybody whole. The only thing they can do if it does not work out is to hope for some reinsurance plan, which I suppose all of us agree would be less attractive than we have available.
>
> (Bench Comments, p.2).

Protective's proposal provided in meticulous detail how the disparate groups of Empire's policyholders would be treated. It was much more detailed and carefully thought out than the other bids received (Compare Rec. Exhs. 2, 3, 6). It guarantees the payment of all death benefits under all of Empire's policies (Rec. Exh. 6, p. 20). It placed a limitation called a "moratorium" of 35% (Later increased to 50%)[3] on all cash benefits that could be exercised voluntarily by Empire policyholders. These benefits included cash values for policies (the amount of cash that can be received if the policy is voluntarily surrendered for cash) loan values and the like (Rec. Exh. 6, p. 4). The Protective treaty provided for full payment of all cash benefits accruing after its effective date, so that policyholders who continue to pay premiums are receiving full policy benefits accruing on account of current premiums (Rec. Exh. 6, p. 24).

The moratorium reduced the reserve liability on Empire's policies to approximately the amount that its assets could be

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[3] See Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of the State of Alabama in No. 77-428, at 10-12.

carried on Protective's balance sheet (R. 1378-1380). Protective guaranteed that at the end of ten years this moratorium would be eliminated and that all policy benefits would be returned to accepting policyholders. Protective further committed to calculate annually a ratio of Empire's assets to its reserve liabilities and reduce the moratorium as the asset-liability ratio improved (Rec. Exh. 6, 1st Amdt. 2; R. 24-26).

The Protective treaty is structured so that Protective receives no profit until the moratorium has been completely eliminated and all policyholder benefits are restored to all accepting Empire policyholders not later than ten years from the effective date of the treaty (R. 238-239, 440, R. Exh. 6, pp. 27-29). All positive cash flow which might accrue from Empire's assets and from premium income prior to the complete restoration of all benefits to the Empire policyholders will be added to the Empire assets to improve the asset-liability ratio and thereby reduce the moratorium under the treaty (*Id.*). Of course, Protective has assumed the risk that Empire's multi-million dollar insolvency cannot be eliminated in ten years, and if this is the case, Protective will suffer a substantial loss as a result of the Treaty (R. 1374-1379).

The Protective Treaty provides that an "assumption certificate" be mailed to each Empire policyholder, which certificate creates a binding contract between Protective and the policyholder pursuant to the terms of the reinsurance treaty unless expressly rejected by the policyholder (Rec. Exh. 6, pp. 37-38). The policyholder is free to reject the Treaty and file a claim for breach of contract against the Empire receiver which retained $2,000,000 in cash for payment of these and other claims. To assure that policyholder who reject the Protective Treaty are not discriminated against, Protective provided in its Treaty for re-transfer to the receiver of assets equal to the reserve liability on the policy of each rejecting policyholder (less the moratorium amount applicable to the policy, so that the

pro rata share of the Empire assets attributable to each rejecting policyholder will be returned to the receiver and added to the $2,000,000 fund (*Id.*).

4. **Approval of the Treaty by the Alabama and Texas Courts.**

Following the recommendation by the insurance commissioners that the Protective Treaty be accepted, the Alabama receiver filed a petition with the domiciliary receivership court seeking authorization to accept, execute and carry out the Treaty. After a ten day trial in which Moody was represented by four lawyers, the main receivership court found and concluded in its June 14, 1975 order: (1) that Empire was impaired in excess of $10,000,000 and insolvent in excess of $6,000,000; (2) that further efforts to rehabilitate Empire would be useless; (3) that it was in the best interests of Empire policyholders for Empire's policies to be reinsured by a reputable and solvent insurance company and that Empire be liquidated; (4) that the interests of the Empire policyholders could not be reasonably secured and protected in the absence of such reinsurance; (5) that no stockholder, including Moody, had presented a rehabilitation plan not involving substantial and undue risk to the Empire policyholders; (6) that Protective had capital and surplus in excess of $25,000,000; and (7) that Protective's proposal best protected the interests of Empire's policyholders, was fair, reasonable, non-discriminatory and fully in accordance with all applicable law (Rec. Exh. 9).

As stated above, a unanimous Alabama Supreme Court affirmed the trial court's order approving the Protective reinsurance treaty, *Moody v. State ex rel. Payne*, 344 So. 2d 160 (1977), and this Court denied certiorari, No. 77-428 (1977).

Approximately six months later a second ten-day trial commenced in the trial court below to determine whether authority

should be granted to the ancillary receiver to transfer Empire's Texas assets to Protective. Moody and his cousin, Bleker, were given unlimited opportunity to adduce any and all evidence on why the authority should not be granted. Moody was represented by six separate lawyers who presented evidence on the minutest details of the Treaty and the financial condition of Empire. At the conclusion of the hearing, Judge Jones concluded that there was no prudent alternative to the Protective reinsurance treaty and that it was in the best interests of the policyholders of Empire for the Treaty to be approved and such authority granted. His bench comments are quoted in part above.

ARGUMENT

I. The Hearing Below Was Just, Fair and Equitable.

Petitioners' first argument is that they were deprived of a "just, equitable, fair and impartial hearing in violation" of the Fourteenth Amendment to the United States Constitution. This argument is specious. The issue was not raised in any court below. It was not suggested in the trial court. It was not raised in the Texas appellate courts.

Rule 23(f) of the Revised Rules of The Supreme Court of the United States requires that a petition for writ of certiorari to a state court must demonstrate with specificity that the federal questions sought to be reviewed were appropriately raised in both the state "court of first instance and in the appellate court." This rule embodies a long line of case authority holding that this Court will not consider federal constitutional issues raised for the first time in a petition for writ of certiorari to review a state court decision. *E.g., Monks v. New Jersey,* 398 U.S. 71 (1970); *Cardinale v. Louisiana,* 394 U.S. 437 (1969). Accordingly, petitioners' first argument is to be rejected because it is made for the first time in this Court.

The argument is also specious as a matter of fact. The sole reference to the record on which petitioners base their first argument is the bench comments of the trial judge, taken out of context, which occurred on April 5, 1973, some twenty months before the February 1975 hearing which petitioners attack as unfair. It is true that at pages 479 through 481 of the record the trial judge candidly stated that he had confidence in the receiver and his staff and often followed the receiver's recommendation when knowing only the "general outline" of a matter. This is, of course, true in any receivership, as no judge has the time to be the chief executive officer of a company is receiver-

ship and review in detail every decision that must be made in managing the company.

The comments in no respect related to any issue in the part of the receivership proceedings under review here, and petitioners made no point about them for four and a half years. The first time that they are mentioned is in petitioners' petition for a writ of certiorari to this Court. At no time did petitioners suggest that the trial judge recuse himself.

Petitioners cannot point to any issue involving either of them where the trial judge did not fully, carefully and impartially consider each and all of the relevant facts and petitioners' arguments before rendering a decision. Specifically, with respect to the hearing on the basis of which the trial judge entered the order appealed from, the judge conducted a full scale, ten day plenary hearing at which petitioners were represented by at least seven lawyers who were allowed to adduce virtually all evidence they desired and to cross-examine respondents' witnesses in the minutest detail. The suggestions that the trial judge did not impartially conduct the hearing below; that he was not fully conversant with the issues and facts flowing from a plenary adversary hearing before rendering his decision; or that he did not impartially render that decision, are spurious.

II. **Petitioners' "Full Faith and Credit" Argument Is Without Merit.**

Petitioners' second argument is that the trial court was "without jurisdiction to hear and decide the case and that it gave full faith and credit to an Alabama judgment which was based on an unconstitutional Alabama statute." This argument, likewise, was not raised in the trial court, the Texas Court of Civil Appeals or in the Texas Supreme Court, and thus is due to be rejected on this ground, as petitioners' first argument.

It also is wholly without merit on the facts. The trial judge did not give full faith and credit to any Alabama judgment before authorizing the Texas ancillary receiver to transfer Empire assets to the domiciliary receiver. The sole issue before the trial court was whether on the basis of all the facts and circumstances adduced at the evidentiary hearing below, it was in the best interests of Empire's policyholders and creditors for Empire's policies to be reinsured pursuant to the Protective Treaty. There is not a single place in the record in which the trial court indicates that on this issue it was deferring to the judgment of any court, much less giving any Alabama judgment "full faith and credit."

In any event, Empire's insolvency was not established by an "arbitrary" devaluation of an Empire asset by the Alabama Commissioner of Insurance, as urged by petitioners. It was established by a judicial determination by the Alabama receivership court following an adversary hearing at which Moody appeared and was represented by counsel (Rec. Exh. 9). This determination was based on abundant evidence, as demonstrated in our response in *Moody v. State ex rel. Payne*, No. 77-428 (Resp. Br., p. 9).

III. **Petitioners Were in No Respect Denied Due Process of Law.**

Petitioners' third argument is that the failure of the court below to provide policyholders, stockholders and creditors of Empire with notice of the hearing violated the due process clause of the Fourteenth Amendment. This argument is without merit for two reasons. *First*, both of the Moody cousins had notice of the hearing below. Not only did they have actual notice, both attended the hearing and were represented by counsel. Moody had six lawyers. They presented evidence and cross-examined the receivers and Protective's witnesses. In fact, three separate

Moody lawyers cross-examined Protective's principal witness, such examination consuming over 300 pages of transcript.

Thus, there is no conceivable way that either of the petitioners can complain that he was not accorded due process. Rather, petitioners seek to become the constitutional guardians of the policyholders and stockholders who did not receive notice of the hearing. It is a settled canon of constitutional law, however, that one party will not be allowed to assert the constitutional rights of another. *See Laird v. Tatum*, 408 U.S. 1 (1962); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1965).

Second, the failure to notify policyholders and stockholders did not deny constitutional rights of either. With respect to policyholders, authorizing the ancillary receiver to cooperate in the consummation of the Protective treaty did not deprive any policyholder of any right whatsoever. Upon Empire's being found insolvent, the policyholders has a single right and that was to file a claim as a creditor against the Receiver for breach of the insurance contract. Such claims would be for the amount of the policies' cash values and the policyholders would share *pro rata* with other creditors in the company's assets. 19 Appleman, *Insurance Law & Practice* § 11061 at 672. Every policyholder had this right before the hearing below and every policyholder had the right following it. The result of the hearing was the approval of a realistic and indeed much more attractive option whereby the Empire policyholders could continue to have life insurance protection under their policies in lieu of filing a claim for breach of contract. Thus, far from depriving the policyholders of anything, the order below resulted in availing them an additional opportunity to transfer their policies to a solvent established company instead of filing a claim against the receiver.

The petitioners apparently argue at page 30 that the few policyholders who file claims against the Receiver will recover less than they would have had not all of Empire's assets except

$2,000,000 been transferred to Protective. Again, as neither of the petitioners is in this class of rejecting policyholders, neither has any justiciable interest in this point. In any event, the contention is demonstrably erroneous. Petitioners fail to point out that for each policyholder who rejects reinsurance and files a claim against the Receiver, Protective has agreed to and is obligated to transfer to the $2,000,000 fund retained by the Receiver assets equal to the cash value of the rejecting policyholder's policy less the moratorium amount (Rec. Exh. 9, p. 38). This means that the $2,000,000 fund retained by the Receiver will be increased by the aggregate amount of the cash values of rejecting policyholders less the moratorium amounts.

With respect to stockholders, as was pointed out in Case No. 77-428, all Empire stockholders received written notice of the plenary hearing on whether Empire should be liquidated and the Protective Treaty approved by the Alabama receivership court. No tenable argument can be made that each was entitled to a second notice of the collateral trial which was held in Texas.

In addition, as even Moody's own expert witness pointed out, there were compelling practical reasons for not notifying policyholders of the hearing (R., pp. 974-977; R. 282-283). Such notice, in advance of approval of the Protective Treaty, would have resulted in a very large number of policyholders rushing to cash in their policies while the Receiver's cash lasted, with the result that Empire's cash resources would have been depleted and its premium income critically reduced (*Id.*). Protective then would have had the right to withdraw from its agreement, which would have resulted in straight liquidation, which the uncontroverted evidence shows would have been disastrous (R. 1759).

IV. **The Arguments of Unlawful Discrimination Are Wholly Unmeritorious.**

Petitioners' fourth argument is that the Protective Treaty unlawfully discriminated among Empire's policyholders, stockholders and creditors. It is indeed interesting to observe how many times an argument can be reprinted in ongoing litigation. This argument was belatedly made in the Alabama trial court, and rejected; it was repeated to the Alabama Supreme Court, and rejected; it was repeated to this Court in Case No. 77-428, after which certiorari was denied; it was made in the Texas trial court, and rejected; it was repeated to the Texas Court of Civil Appeals, and rejected; it was repeated to the Texas Supreme Court, and rejected; it is now repeated again to this Court.

The Texas Court of Civil Appeals cogently rejected it in the proceedings below, as follows:

> The appellants assert a number of reasons why they say the agreement establishes unlawful discriminatory preferences among Empire's policyholders and creditors. We overrule these contentions.
>
> . . . The appellants' argument is erroneously based upon the premise that all Empire policies are alike and must therefore be treated identically in the reinsurance contract. The record shows that the policyholders come from many different companies with many different plans and policies, and its supports the determination that treating the different policyholders identically in the reinsurance plan and ignoring the various policy distinctions would result in unfair discrimination. Rather, the agreement identifies each unusual or unique group and treats it with special provisions formulated to produce equitable benefits for all. It is axiomatic that a different classification and treatment of persons based on real and substantial differences between them is not per se unlawful discrimination. See 12 Tex.

> Jur.2d 458, Constitutional Law, § 111. Such different treatment is often necessary, as it is here, to *avoid* unlawful discrimination.
>
> * * *
>
> Obviously, policyholders who accept reinsurance and the eventual restoration of all policy benefits which come with it are treated differently from those who reject. But every policyholder has his choice and makes it voluntarily. At any given point in time all policyholders are treated precisely the same in relation to the moratorium. Different treatment as a result of a voluntary election can hardly be classified as arbitrary or unfair discrimination. In any event, the plan provides that Protective will transfer to the receiver assets equal in value to the reserve liability for every policy of every rejecting policyholder less the moratorium amount on each such policy. The Receiver can then pay this amount to the rejecting policyholder. This payment approximates the initial value of the agreement to policyholders who accept reinsurance, and thus produces equal treatment of accepting and rejecting policyholders as closely as it can be done.
>
> In addition to the terms we have cited for payment of claims of rejecting policyholders, the agreement provides for the receiver to retain an additional $2 million for payment of the claims of other creditors which have not been assumed by Protective. Under the testimony, this fund is sufficient to treat all such claims equitably. There is no discrimination.
>
> *Moody v. State*, 538 S.W.2d 158, 159-60 (Ct.Civ. App.-Waco 1976).

Petitioners do not demonstrate in any way how this analysis by the Texas Court of Civil Appeals is erroneous either as a matter of law or fact.

Not only are the discrimination arguments completely without merit on the facts, but neither Moody nor Bleker has any standing to assert them, as neither is in any group which is allegedly discriminated against.[4]

In an attempt to shorten this brief, rather than to respond to the specific contentions piecemeal we have reproduced our response made in the courts below as Appendix A to this brief.

V. Petitioners' Fifth Argument Is Wholly Unmeritorious.

Petitioners' fifth argument is that the entire ancillary receivership proceedings below were invalidly instituted. Petitioners seek to couch this argument as one involving "equal protection of the laws." In fact, the argument raises nothing but state law issues rejected in the state courts below. In any event, if petitioners are correct on state law, as they demonstrably are not, the ancillary receiver never had jurisdiction over any of Empire's assets and thus in 1975 they were properly transferred to the domiciliary receiver who otherwise had jurisdiction over them.

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[4] A possible exception is that Moody claims to be a creditor of Empire as a result of several transactions antedating the receivership. With respect to Moody's creditor claims, the Court of Appeals found that the $2,000,000 fund retained for the payment of such claims was "sufficient to treat all claims equitably." This conclusion is amply supported by the record (R. 160-164).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari be denied.

Respectfully submitted,

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Proof of Service

Proof of service of three copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari upon all parties separately represented by counsel was filed by Drayton Nabers, Jr., a member of the Bar of the United States Supreme Court, with the Clerk of the United States Supreme Court on the same date the brief in opposition was filed.

APPENDIX

REPLY POINT ONE (RESTATED)

The Trial Court Properly Approved the Protective Reinsurance Proposal Because It Protected the Interests of the Policyholders and Creditors of Empire in a Fair and Non-Discriminatory Fashion. (In Reply to Points One Through Eleven)

Petitioners have reproduced in Points One through Eleven their "laundry list" of "discrimination" complaints presented to the District Court. In formulating those points, Petitioners have failed to show their interest in asserting certain claims because almost invariably they are wholly unaffected by the "discrimination" of which they complain. Petitioner Moody is not a policyholder of Empire and therefore has no standing to object to any feature of the plan as it relates to policyholders. Petitioner Bleker is a policyholder and stockholder (S.O.F. 608). However, as we shall show below the claimed "discrimination" does not affect Bleker. Petitioners lack standing and a justiciable interest to assert complaints regarding facets of the agreement which do not affect them. It is a generally accepted rule that only one who has been harmed by an action has standing to attack that action. The Supreme Court has succinctly stated the rule:

> The law is well established that only those against whom a discrimination is made by statute can invoke the benefit of the Constitution and laws preventing such discrimination. **Oil Well Dlg. Co. v. Associated Indemnity Corp.,** 264 S.W. 2d 697-700 (Tex. 1954).

Even if Petitioners be granted standing, it would appear that much of their argument proceeds from the erroneous premise that policyholders and other creditors are on a complete parity. Reference to both Texas and Alabama law indicates that this premise is erroneous. Art. 21.39-A, the Texas Asset Protection

Act, clearly provides for "preferential claims against assets in favor of owners, beneficiaries, assignees, certificate holders, or third-party beneficiaries of insurance policies." Art. 21.39-A, Texas Ins. Code. Likewise, Act No. 1040, 1975 Sess., Ala. Legis. provides:

> [A]ll beneficiaries of and all persons holding or owning a contract of insurance with [an insurer in receivership] shall be a preferred creditor . . . Policyholders are hereby removed from the class of general creditors and all laws and court decisions in conflict herewith shall have no further application. This Act shall apply to all policyholders of insurers in receivership on the effective date of this Act . . .

Therefore, it is clear that Petitioners' basic premise is erroneous and their arguments regarding discrimination between policyholders and other creditors must fall.

In any event even a cursory examination reveals that Petitioners' claims of discrimination are totally without merit. The Petitioners proceed on the premise, that every Empire policyholder is just like every other policyholder and therefore the treaty must treat each one identically. This premise is false as the evidence abundantly shows. Empire policyholders result from a hodge podge of companies put together in a long series of improvident mergers and acquisitions masterminded by Moody (S.O.F. 1401). The testimony shows that the 40,000 policyholders came from dozens of different companies with scores of different insurance plans and policies (S.O.F. 1371-1372, 1399, 1401, 1737-1738). If Protective had treated every policyholder identically ignoring the special and unique terms of the various policies, this would have resulted in inequitable and unfair discrimination. Rather Protective identified each unusual or unique group of policyholders and treated it with special provisions geared to produce equitable benefits with the others (R. Exh. 6, pp. 6-9, 19-20, 22, 24, 34). This, of course,

resulted in different treatment but only because certain policies had materially different terms and conditions. The law has always allowed different treatment for persons situated differently. See **Board of Ins. v. T.E.I.A.,** 189 S.W.2d 47, aff'd 192 S.W.2d 149 (Tex. 1946). There, the Court of Civil Appeals held that Article 21.21 does not prevent "distinctions and differences in the payment of dividends between groups or between policyholders within groups based upon loss experiences within or between groups. . . ." *Id.* at 53. In other words, a proper classification based on real differences does not amount to unlawful discrimination. See *Rucker v. State,* 342 S.W.2d 325 (Tex.Crim.App.—1961); *Langdeau v. Bouknight,* 344 S.W.2d 435 (Tex. 1961). In fact such different treatment is often necessary to avoid unlawful discrimination.

We now discuss each example of discrimination claimed by Petitioners separately.

1. **There Is No Unfair Discrimination Against Policyholders Who Reject Reinsurance.**

Petitioners argue that the policyholders such as Bleker who have accepted reinsurance have been favored over those who voluntarily elected to reject reinsurance. It is indeed impossible to understand how Moody who is not a policyholder and Bleker who benefits from the claimed discrimination have standing to raise this point, but in any event it is absolutely spurious.

It is, of course, obvious that policyholders who accept reinsurance and Protective's guarantee of the restoration of all policyholder benefits are treated differently from those who reject and file a claim against the receiver for breach of contract. Every policyholder has this choice and makes it voluntarily. Different treatment as a result of a voluntary election can hardly be classified arbitrary or unfair discrimination.

In any event, the treaty contains meticulously detailed provisions, completely ignored by Petitioners, to assure that equities between these two groups are maintained as nearly as possible. The Treaty provides that Protective will transfer to the Receiver assets equal in value to the reserve liability for every policy of every rejecting policyholder less the moratorium which would have been applicable to the policy (R. Exh. 6, pp. 37-38). The receiver can then pay this amount out to each rejecting policyholder. This payment approximates the initial value of the treaty to policyholders who accept reinsurance and thus produces equity as closely as possible between accepting and rejecting policyholders (S.O.F. 62-63, 1735-1736).

The fact which Petitioners try to build their argument on is that Protective is entitled to file a claim against the Receiver on behalf of accepting policyholders in the amount of the moratorium for each policy. This, say the Petitioners, gives accepting policyholders "two bites at the apple." Regardless of how many bites at the apple accepting policyholders may have, this does not result in any discrimination. Certainly the receivership court will pay Protective's claims on behalf of accepting policyholders only if it would promote equality of treatment between accepting and rejecting policyholders. The Protective claim merely allows the receivership court to make a distribution to Protective for the benefit of accepting policyholders in the event that funds in the receiver's possession allow payment to rejecting policyholders in excess of the value of the reinsurance treaty to accepting policyholders (S.O.F. 434-436). In such circumstances unless a distribution is made to Protective for accepting policyholders, they will be unfairly discriminated against. Protective's claim is therefore an equalizing device and in no respect an instrument of discrimination.

2. **There Is No Unfair Discrimination Against Creditors Whose Claims Are Not Assumed by Protective.**

Petitioners make a bevy of arguments that certain creditors whose claims were not assumed by Protective have been discriminated against. First they argue that there was no evidence that the $2,000,000 fund to be retained by the Receiver for payment of such creditor claims is adequate. This is simply not the case. Uncontroverted evidence shows that this fund is amply sufficient for this purpose (S.O.F. 160-164). Petitioners also argue certain groups of creditors have had their claims accepted by Protective whereas others have not. Protective, quite justifiably was interested in Empire's policyholders and had no interest in litigating and resolving the host of claims not relating to Empire's life insurance policies. But any creditor whose claims has not been accepted by Protective may file a claim against the Receiver and be paid from the $2,000,000 fund which the evidence shows is more than adequate to treat all such claims equitably (*Id.*).

3. **There Is No Unfair Discrimination for or Against United Founders, PSIP and SPP5O and American Trust Policyholders.**

a. **United Founders.**

The undisputed evidence shows that the United Founders' policyholders are in a unique position in that none of them have any contract with Empire (S.O.F. 1394-1396, 1734-1735). Rather their policy is with United Founders of Illinois. United Founders in turn has a co-insurance agreement with Empire. It is therefore not surprising that the terms of Protective's treaty deal specially with this unique situation. The evidence shows clearly, however, that payments to United Founders under the Treaty result in equitable and fair treatment to all policyholders

and Moody's own expert witness specifically acknowledged that no discrimination resulted from these provisions (S.O.F. 1394, 1396, 1734-1735, 656-657) and Petitioners are unable to point to any instance in which the treaty's provisions for the United Founders co-insurance agreement could result in any inequity. It should be noted that Bleker is not a United Founders policyholder.

b. **The PSIP-1 and SPP5O Policies.**

Similarly, the different treatment for PSIP-1 and SPP-5O policies, at page 19 of the Treaty, results from the fact that the benefits for these policies are payable in part from so-called separate accounts unlike the balance of the Empire policies (R. Exh. 9, p. 19). A separate account is an account which is maintained apart from Empire's general asset accounting based on a part of premiums specifically allocated to the separate accounts. Policy benefits relate to the amount of the special account. To have ignored this special status would have resulted in arbitrary discrimination against these policyholders. Again Bleker does not have a PSIP-1 or a SPP5O policy.

c. **American Trust.**

It is indeed surprising that the Moody cousins seek to show inequity of treatment by reference to the American Trust policyholders as this example graphically demonstrates the total disregard of policyholder rights shown by Moody when he was running Empire. Empire merged with American Trust Life Insurance Company. The merger agreement stipulated that Empire would maintain American Trust assets in a separate account for the benefit of American Trust policyholders. Moody, however, completely ignored this commitment and transferred good, income producing assets out of the American Trust account into Empire's general funds thus destroying the special

account created by the merger agreement and the protections it was to give the American Trust policyholders (S.O.F. 1382-1386, 1734).

Petitioners nevertheless argue that Protective should be faulted for not basing the benefits under its treaty on the special account which Moody destroyed. The evidence shows that if Protective had so based benefits to the American Trust policyholders, it would have resulted in much lower benefits to them than to other policyholders, thus putting in concrete the undermining of the merger agreement by Moody (*Id.*). Bleker is not an American Trust policyholder.

4. **There Is No Unfair Discrimination Against Policyholders Who Elect Paid-Up or Extended Term Insurance.**

The reinsurance treaty specifies in detail how policyholders are to be treated if they elect paid-up or extended term insurance (R. Exh. 9, pp. 21-22). These elections are entirely voluntary and every policyholder who makes the elections is treated precisely the same (S.O.F. 1403-1405). It completely escapes us that Petitioners claim that equal treatment of every policyholder who makes a voluntary election results in unlawful discrimination. In any event Moody is not a policyholder and could care less about this option and as Bleker's policy is fully paid up, it can have no effect on him.

5. **There Is No Unfair Discrimination Respecting Treatment of Insurance on Moody's Life.**

The First Amendment to the Treaty provides that the Receiver shall assign to Protective the death proceeds of $4,-350,000 of the approximately $12,000,000 of life insurance on Moody's life which secures the value of Protective's interest in the Libby Shearn Moody Trust assigned to Protective under

the Treaty (R. Exh. 9, 1st Amdt. p. 3). The Receiver continues to have rights to the balance of the proceeds but the Treaty provides that if the Receiver decides to reduce the amount of the insurance, Protective, by becoming responsible for payment of the premiums, may acquire any part of the Receiver's insurance he decides to terminate. This provision merely allows Protective to take over the Receiver's share of the insurance if Protective disagrees with the Receiver's judgment to terminate the insurance, and it is hard to see how this option could be deemed discriminatory. Certainly if Protective did not have the option, the rejecting policyholders whom Petitioners claim are discriminated against as a result of the option would be no better off. Finally, we point out again that neither Moody nor Bleker rejected reinsurance and therefore neither has any legitimate concern about the status of rejecting policyholders.

6. **There Is No Unfair Discrimination Respecting the Payment of Dividends.**

Petitioners claim that the Treaty unlawfully discriminates in favor of PSIP policyholders in that they and not other policyholders receive "dividends" under the Treaty. The treaty recites and there was no dispute at the trial below on the point that the PSIP "dividend" while denominated a "dividend" is in substance identical to a "pure endowment" which the Treaty provides shall be paid in full (R. Exh. 9, p. 34; S.O.F. 657). Thus, the provision to pay PSIP policyholders "dividends" results in PSIP policyholders being treated equally with other policyholders entitled to payment of pure endowments and Moody's own expert so declared (S.O.F. 657). Contrary to Petitioners' contention failure to treat this so-called dividend as a pure endowment might have resulted in the sort of discrimination of which Petitioners complain.

7. **The Provisions for Work-Out of the Moratorium Do Not Result in Discrimination.**

Petitioners' argument in Point Two is that the Protective Treaty creates "tontine" insurance and unfairly discriminates against policyholders who elect to surrender their policies for cash early in the ten-year moratorium period as opposed to those who may surrender later or after the period has expired. This contention was the subject of extensive testimony at trial which shows overwhelmingly that the formula for reducing the moratorium is equitable and based on economic reality.

The reason for the moratorium, as we had previously explained, is that Empire is insolvent and its assets are worth millions of dollars less than the reserve liabilities of the policies Protective assumes under the Treaty (S.O.F. 1367, 1379). To offset this multi-million dollar gap the moratorium reduces the reserves by limiting the amount of cash the policyholders may voluntarily withdraw under the terms of their policies.

Protective committed to completely eliminate the moratorium and restore all policy benefits by no later than ten years from the effective date of the Treaty. This was possible because under proper management Protective projected that the gap between Empire assets and reserve liabilities would gradually reduce during the ten-year period (Def. Exh. 8, S.O.F. 378-380). As it reduced Protective agreed to reduce the moratorium to equitably reflect the amount of the gap reduction.

One of the reasons this insolvency gap reduces is that policyholders will continue to pay millions of dollars of premiums which will be added to Empire assets and invested at high income yields. The policyholders who do not surrender their policies and continue to pay premiums therefore make an essential contribution to the ultimate work out of the moratorium (S.O.F. 1367-1371, 1732-1733, 1740). The Treaty provides that if they continue to pay premiums, they receive the benefit of this contribution by entitlement to greater cash values as

the moratorium reduces. Those policyholders who cash out early not only do not continue to contribute money but diminish the Empire fund by withdrawing cash which otherwise could be invested at high yields and thereby contribute to the reduction of the moratorium (*Id.*). These facts are absolutely undisputed and when understood, it is clear that to give the policyholders who cash in early treatment with those who cash in later would be grossly unfair.

Thus, though there is different treatment between policyholders who cash out early and those who persist, the economic advantage gained by persisting policyholders is directly related to their contribution to the reduction of the moratorium (*Id.*).

Petitioners argue that "though policyholders are entirely of the same class and may have the same expectation of life, under the Reinsurance Agreement policyholders who decide to cash in their policies or lapse in early years are penalized and much less than policyholders who do not" (App. Br. p. 17). This ignores the critical fact that at any point in time *all policyholders are treated precisely the same*. If the moratorium can be characterized as a "penalty" as Petitioners so characterize it, the "penalty" results from Empire's insolvency caused by Moody and in no respect caused by any Receiver or Protective. The "penalty" will reduce hopefully because Protective will prudently and efficiently manage the shipwreck left by Moody but the simple, immutable economic fact is that the "penalty" cannot be eliminated all at once, but only gradually over a period of years.

Petitioners attempt to brand as discriminatory the treatment of policyholders who withdraw funds on deposit or make a policy loan after the moratorium becomes effective and those who had borrowed in advance of the receivership. However, any plan must incorporate a beginning point. The differing treatment arising from establishment of a cut-off date is not discriminatory.

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OCTOBER TERM, 1977

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JOHN S. BLEKER,

Petitioners,

VS.

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Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

Now come the Petitioners, SHEARN MOODY, JR., and JOHN BLEKER, and file their Reply to the Brief in Opposition to Petition for Writ of Certiorari filed by the Respondents in the above-entitled and numbered cause. In support hereof, the Petitioners would respectfully show this Honorable Court the following:

I.

THE POLICYHOLDERS, STOCKHOLDERS AND CREDITORS OF EMPIRE WERE DENIED THE EQUAL PROTECTION OF THE LAWS SINCE THE TEXAS ANCILLARY RECEIVERSHIP PROCEEDING WAS NOT INSTITUTED IN ACCORDANCE WITH SECTION 13 OF ARTICLE 21.28 OF THE TEXAS INSURANCE CODE.

The constitutional infirmities inherent in the Texas Ancillary Receivership proceeding involving Empire Life Insurance Company of America ("Empire") are evident at the outset. The Texas Ancillary receivership proceedings were initiated in total defiance of the statutory requirements of Section 13, Article 21.28 of the Texas Insurance Code. (See Pet. pp. 57-65). As a result, the ancillary receivership court lacked jurisdiction to approve the reinsurance treaty and by proceeding it clearly denied Empire's policyholders, stockholders and creditors the equal protection of the laws guaranteed by the Fourteenth Amendment.

In the regulated field of insurance state courts cannot arbitrarily ignore statutory procedure. When an insurance company with over 40,000 policyholders is placed in receivership, statutory procedures must be followed in order to safeguard the rights of all interested parties. At a minimum, equal protection of the laws means the fair and consistent enforcement of the laws. Such total defiance of established statutory procedure is inexcusable and is totally contrary to the equal protection clause of the Fourteenth Amendment.

The Respondents' assertion that the issue is of no consequence since "the ancillary receiver never had jurisdiction over any of Empire's assets . . ." (Br. p.20), not only contradicts their admission that the Texas Ancillary Receiver had jurisdiction over most of Empire's assets (Br. p.3) but is also grossly erroneous as a matter of laws. See, Texas Insurance Code, Section 13, Article 21.28. *City Bank Farmers Trust Co. vs. Schnader*, 293 U.S. 112 (1934).

II.

THE APPROVAL OF THE TREATY OF ASSUMPTION AND BULK REINSURANCE BY THE TEXAS ANCILLARY RECEIVERSHIP COURT WITHOUT NOTICE TO THE POLICYHOLDERS, STOCKHOLDERS AND CREDITORS OF EMPIRE SITUATED WITHIN THE STATE OF TEXAS DEPRIVED THEM OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW CONTRARY TO THE FOURTEENTH AMENDMENT.

Not only was the ancillary receivership initiated in defiance of statutory procedure, but the appointment of the permanent ancillary receiver and the approval of the reinsurance treaty occurred without notice to Empire's policyholders, stockholders, and creditors in Texas. Petitioner Bleker pointed out in his Plea in Intervention that as a policyholder he had absolutely no notice whatsover of the appointment of any ancillary receiver for Empire in the State of Texas. He requested that the proceedings be abated until all policyholders were notified and given an opportunity to appear at the hearing pertaining to the Reinsurance agreement. *His request was denied!*

Surprisingly enough, the Respondents have asserted that the absence of notice with regard to the hearing on the treaty is insignificant since the Petitioners were present at the hearing and since informing the policyholders of said hearing may have caused a run on cash reserves. The obvious response to these arguments is, of course, that the Petitioners have standing to assert the deprivation of constitutional rights on behalf of the policyholders, stockholders and creditors who were not notified since the latter were denied an opportunity to appear and protect their rights. Further, the argument that the policyholders would immediately cash in their policies upon receipt of notice implies the absence of any ability on the part of the policyholders to make a rational choice as to whether they should stay with the company. Certainly those policyholders who would have chosen to cash in their policies and reject reinsurance were entitled to appear and challenge the manner in which their claims would be handled and the sufficiency of the $2,000,000.00 fund set aside to pay creditors' claims. The ancillary receiver's admission that Petitioner Moody alone had filed claims totalling $2,000,000.00 (R. 164) is clear evidence that the fund was insufficient. The possibility that upon receipt of notice some of the policyholders would have cashed in their policies is certainly no justification for withholding notice from all of the policyholders.

The Respondents also asserted that notice to Empire's stockholders, policyholders and creditors was not necessary in the ancillary proceeding because notice had been given with regard to the Domiciliary hearing in Alabama. Evidently, the Texas Court was not persuaded that it should simply defer to the

Alabama Court's approval of the reinsurance agreement, since it did conduct a hearing on the reinsurance agreement. Unfortunately, no notice of said hearing was given to Empire's policyholders, stockholders and creditors within the State of Texas. Since a majority of Empire's stockholders, policyholders and creditors resided in Texas, and since it is clearly less burdensome for them to attend a hearing in the State of their residence, the failure of the Texas Ancillary Receivership Court to provide them with notice and an opportunity to appear at the hearing effected a significant deprivation of their property without the due process of law guaranteed by the Fourteenth Amendment.

III.

THE PETITIONERS HAVE BEEN DENIED THE RIGHT OF DUE PROCESS IN THAT THE RECEIVERSHIP COURT DEPRIVED THEM OF A JUST EQUITABLE FAIR AND IMPARTIAL HEARING IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Petitioners' fundamental right of due process was directly violated by the Ancillary Receivership Court, since that Court simply ratified authorized and confirmed any and all pertinent demands and requests of the Receiver. He did so under the misconception that he merely served as a statutory "rubber-stamp" of the State agency in clear and direct violation of the Constitutional protectives of due process and separation of powers.

In response to the foregoing argument, the Respondents have asserted that the issue was not specifically asserted in the pro-

ceedings below. The Petitioners would point out that this Court has made it perfectly clear that it may of its own Motion notice errors to which no exception has been taken, if such errors seriously affect the fairness, integrity or public reputation of judicial proceedings. See, *Johnson vs. U.S.*, 63 S.Ct. 549, 318 U.S. 81 (1943). This Court clearly has jurisdiction to consider "plain error" not specifically assigned as error below. *Sibbach vs. Wilson & Co.* 61 S.Ct. 422, 312 U.S. 1 (1941); *Mahler vs. Eby*, 44 S.Ct. 283, 264 U.S. 32 (1924); *U.S. vs. Pena* 20 S.Ct. 165, 175 U.S. 500 (1899).

IV.

THE TRIAL COURT WAS WITHOUT JURISDICTION TO HEAR AND DECIDE THE CASE IN THAT IT GAVE FULL, FAITH AND CREDIT TO AN ALABAMA JUDGMENT WHICH WAS BASED UPON AN UNCONSTITUTIONAL ALABAMA STATUTE.

Before the ancillary receivership court could entertain the proposal to reinsure Empire it had the duty of determining whether Empire was actually insolvent. The court's refusal to admit evidence on the issue and its decision to give full, faith and credit to the Alabama decree deprived Empire's policyholders, stockholders and creditors of their property without due process of law.

Empire's alleged statutory insolvency occurred as a result of the Alabama Insurance Commissioner's arbitrary devaluation of its life estate interest in the Libbie Shearn Moody Trust from $14,000,000.00 to approximately $4,250,000.00, after the trust interest had been carried at the $14,000,000.00 value for approximately seven years. The devaluation was predicated upon Section 745(13) of the Alabama Insurance Code which is devoid of any guidelines and which provides the Alabama Insurance Commissioner with unlimited and unbridled discretion as to the valuation of assets. (See Pet. pp. 24-27)

It is the general principle of statutory law that a statute must be definite and certain to be valid. Furthermore, it has uniformly been held that a law violates due process if it is so vague and standardless that it leaves the public uncertain as to the conduct thereby prohibited, or leaves judges and juries free to decide without any legally fixed standards, what is prohibited and what is not in each particular case. *Giaccio v. State of Pennsylvania*, 387 U.S. 399, 86 S.Ct. 518. It is also clear that an unconstitutional statute is void and unenforceable and has no legal effect. *Miller v. Davis*, 136 Tex. 299, 150 S.W.2d 973 (1941) *Colden v. Alexander* 141 Tex. 134, 171 S.W.2d 928 (1943).

The ancillary receivership court therefore erred in giving of full, faith and credit to the void Alabama decree and by failing to make an independent determination on the issue of insolvency, it lacked jurisdiction to approve the Treaty. The erroneous recognition of the void Alabama decree also prevented the Petitioners from raising the constitutional issues pertaining to the constitutionality of §745(13) and the deprivation of vested contractual rights caused by the devaluation of the trust interest.

Section 810 of the Alabama Insurance Code, entitled "Savings Clause," indicates that the Act shall not impair rights accruing prior to its effective date. Section 745(13) of the Code became effective in 1972. Numerous policyholders, stockholders

and creditors acquired vested contractual rights prior to 1972 in reliance on the $14,000,000.00 valuation assigned to the trust interest. The application of §745(13) in 1972 to effect a $10,000,000.00 decrease in the value of the interest clearly effected a substantial deprivation of vested property rights in violation of §810 as well as Article I, Section 10 of the U.S. Constitution.

V.

THE TREATY OF ASSUMPTION AND BULK REINSURANCE TREATS DIFFERENTLY THOSE POLICYHOLDERS AND CREDITORS WHO ARE SIMILARLY SITUATED AND FAILS TO TREAT THOSE WHO ARE DIFFERENTLY SITUATED IN A MANNER CONSISTENT WITH THEIR RIGHTS.

The Petitioners have attacked with specificity the unlawful discrimination effectuated by the Treaty of Assumption and Bulk Reinsurance. (Pet. pp. 33-57). Since the Texas Court of Civil Appeals for the Tenth Supreme Judicial District of Texas wrote the initial appellate opinion concerning the Reinsurance treaty and since the Alabama Supreme Court felt compelled to recite said opinion as a justification for approving the treaty, it is imperative that the constitutional issues raised by the ruling of the Texas Court be examined with care. The Petitioners have challenged in detail the basis for the Texas Court's approval of the treaty to-wit: that the differences in treatment are based upon real and substantial differences. There was however no evidence presented below justifying the discriminatory treatment and establishing any rational basis for such treatment.

In addition to the unlawful discrimination caused by the Treaty, it is also clear that the Treaty has created a profit for the Reinsurer at the expense of Empire's policyholders, stockholders and creditors. Despite the Respondents' assertion that Protective Life Insurance Company will receive no profit until the moratorium imposed on cash benefits has been eliminated (Br. p. 10), Mr. Thomas K. Pennington, a Vice-President of Protective, admitted in a Federal District Court proceeding involving Empire in 1976 that: "It (the Empire Transaction) will account for roughly two percent (2%) of profits in this year." (R 1242) *Payne v. Moody* (N.D. Tex. CA-5678). It is clear therefore that the Treaty not only effectuated an unlawful discrimination among Empire's policyholders, stockholders and creditors but also created a profit for Protective at their expense.

CONCLUSION

Wherefore for the foregoing reasons, the Petitioners pray that their Petition for a Writ of Certiorari to the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas be granted.

Respectfully submitted,

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PROOF OF SERVICE

Proof of Service of three copies of Petitioners' Reply to Respondents' Brief in Opposition upon each of the parties separately represented by counsel was filed by FRANK G. NEWMAN, a member of the Bar of the United States Supreme Court on the same date the Reply was filed.